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IN THE

Supreme Court of the United States

No. 337

THE GREENHILLS HOME OWNERS CORPORATION, a corporation,

Petitioner,

v.

THE VILLAGE OF GREENHILLS, OHIO, an Ohio Municipal Corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

CHARLES P. TAFT,
Attorney for Petitioner,
1003 First National Bank Bldg.,
Cincinnati, Ohio—45202.

On the Petition:
ROBERT E. DOLLE
THOMAS H. MONGAN

THE JOHNSON & HARDIN CO., LAW PRINTERS
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on March 16, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Common Pleas of Hamilton County, Ohio is unreported and is printed in Appendix B, infra, p. 57. The opinion of the Hamilton County, Ohio Court of Appeals is unreported and is printed in Appendix B, infra, p. 69. The opinion of the Supreme Court of Ohio, printed in Appendix B, infra, p. 81, is reported in 5 O. S. 2d 207.

JURISDICTION

The judgment of the Supreme Court was entered on March 16, 1966. Rehearing was denied on April 13, 1966. The jurisdiction of the Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether a "greenbelt" provision of a zoning ordinance which permits the land in that zone, owned privately by petitioner, to be used *only* for "a. Public park reservation, and playground. *b.* Public recreational buildings. c. Allotment gardens, farm, nursery, gardens. d. Public utilities. e. Bus passenger station. f. Signs erected by public authority," is a violation of the United States Constitution.

2. Whether the misinterpretation by the Supreme Court of Ohio of the undisputed facts in the record in order to provide the basis for their decision on estoppel on Questions 3, 4, and 5 below, in itself constituted a denial of due process, the error being so gross and obvious as to constitute arbitrary action. (*Roberts* v. *N. Y.*, 295 U. S. 264.)

3. Whether the conduct of the petitioner (which was buying the entire village from the United States as the channel or intermediary for the purchase of the existing houses by the occupants, with an undertaking previously expressed to Congress to build and sell 500 additional units to veterans and others) in generally supporting the adoption of the zoning ordinance with the greenbelt provision in it, estops it eleven years later from complaining of the unconstitutionality of the ordinance under the doctrine of *McKinney* v. *Carroll*, (1838) 2 Peters 66.

4. Whether the failure of the petitioner to disclose to the village officials the opinion of its counsel that the ordinance was unconstitutional estops it eleven years later from com-

plaining of the unconstitutionality of the ordinance under the doctrine of *McKinney* v. *Carroll*, (1838) 2 Peters 66.

5. Whether the conduct of the petitioner in requesting and receiving from the United States a reduction in the purchase price by reason of the effect of the greenbelt provision in it on the value of the greenbelt acreage, which reduction enured to the benefit, not of petitioner, but of the 312 original subpurchasers from petitioner, estops it eleven years later from complaining of the unconstitutionality of the ordinance under the doctrine of *McKinney* v. *Carroll*, (1838) 2 Peters 66.

6. Whether the village respondent which was not in any way involved in petitioner's negotiations for the purchase of Greenhills from the United States, can claim the benefit of estoppel, when the United States disclaimed any further concern after its mortgage was transferred to Connecticut General Life Insurance Company two years later, which in turn claims no estoppel.

STATE STATUTE INVOLVED

The statutory provisions involved are Articles I and VI of the Zoning Ordinance of the Village of Greenhills. They are printed in Appendix A, infra, p. 54.

HOW FEDERAL QUESTION IS PRESENTED

The petitioner filed three cases in the Hamilton County, Ohio Common Pleas Court, two in mandamus to require issuance of building permits by the Village and one for a declaratory judgment. The cases were consolidated for trial and appeal.

In each petition (Record p. 4) appears the following allegation:

> "Relator says that the above-described premises being privately owned by relator that [sic] the continued

enforcement of Article VI of the Greenhills Zoning Ordinance deprives the relator of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 1, 16, and 19 of the Constitution of Ohio."

The Hamilton County, Ohio Common Pleas Court in its opinion (Appendix B, *infra*, p. 57) wrote:

> "The Court holds that the restrictions contained in Article VI of said Zoning Ordinance are valid but subject to modification at the option of the Village of Greenhills."

The Ohio Court of Appeals quoted the above and wrote (Appendix B, *infra*, p. 69):

> "With the above conclusion the Court cannot agree."

The Ohio Court of Appeals went on to find (Appendix B, *infra*, p. 80):

> "that Article VI of the Greenhills, Ohio zoning ordinance is unconstitutional and by excessive regulation amounts to a taking of private property without just compensation and is an unreasonable exercise of the police power having no reasonable relation to the public health, safety, morals or general welfare."

The Supreme Court of Ohio in its syllabus 3. (5 O. S. 2d 207, Appendix B, *infra*, p. 81) wrote:

> "Whoever (1) insistently encourages . . . (2) fails to disclose . . . (3) thereafter purchases . . . (4) requests and receives . . . is estopped from invoking the judicial power to grant relief from such restrictions on the ground that it constitutes a taking of private property without compensation or due process within the meaning of the federal and state Constitutions."

STATEMENT

Petitioner filed suit in the Hamilton County, Ohio Common Pleas Court on March 7, 1960, for a writ of mandamus to compel the respondent village and its Safety Director to issue a building permit for a single family dwelling. The petitioner had exhausted all administrative remedies. The ground of refusal was that the petitioner's property came under Article VI of the Greenhills zoning ordinance (Appendix A, *infra*, p. 54) which ruled out single family dwellings.

The petitioner's expert witness at the trial, at that time also occasionally employed by the respondent, Civil Engineer John Duffy, testified that the property of the petitioner was not suitable for farming, permitted in Greenbelt zoning (Record pp. 1322-3). This testimony was not disputed. He also testified that its best use was for residence purposes (Record pp. 1310-11). This was not disputed.

Exhibit 1 (Copy attached to Petition—Rec. p. 1336) indicates that this respondent village has an incorporated area of 695.6 acres, which includes the 103.6 acres petitioner wants rezoned. Exhibit 1 shows that this incorporated area of 695.60 acres is completely surrounded by a Hamilton County Park of 1985 acres (Green, Exh. 1), or approximately 3 acres of park for each acre of incorporated area.

Further observing Exhibit 1, we note there were originally 345.6 acres in greenbelt zoned area (orange). Petitioner now owns 103.6 acres. 37.2 acres of greenbelt have been rezoned by the village and residences built. The rest has been conveyed, part to the county park and part to private owners.

The Greenhills project was developed under the Emergency Relief Appropriations Act of 1935 Stat. 115, by Rex Tugwell, head of the Resettlement Administration, and was later transferred to the Public Housing Administration.

The first occupancies took place April 1, 1938 (Rec. 1047). In 1939 the Village was incorporated (Rec. 1048), as an Ohio municipality, though owned by the U. S. Government, leaving 2900 acres outside.

The layout of the Village of Greenhills, an extension of the Village, and of two additional clusters of residential streets laid out as two townsites on 3400 acres of property, were planned originally by Justin Hartzog before 1937 (Rec. 1049. See Map Rec. 1335).

The distinctive characteristics of this Village and two other similar "greenbelt towns" was that they were residential, surrounded by a belt of trees and fields called greenbelt. The other two towns were in Greenbelt, Maryland, and Greendale, Wisconsin.

676 units were originally constructed in Greenhills with a few free standing units, a number of 2, 4 and 6 row house units, and a number of 8 and 10 unit apartment houses. In 1946 or 1947 an additional 121 free standing units were built by Joseph Dillon, title to each of which was transferred to the buyers, the title to all the rest of the Village being retained by the United States (Rec. 1049), as well as to the rest of the 3400 acres in the Greenhills project.

The House of Representatives Appropriation Committee from 1946 on was unhappy about the United States retaining any of the "Greenbelt" towns. The Public Housing Administration announced that it would dispose of all the Greenbelt towns (Rec. 1067). At this time the only authority for sale was Section 3709 R. S., found in Title 41, Section 5, United States Code, as amended by P. L. 600, 79th Congress, August 2, 1946 (Rec. 1108-9-10).

This announcement created great excitement in the Village where many of the residents were quite satisfied to continue paying rent and were upset by the idea of either being evicted or having to purchase their property (Rec. 268). Four of the residents, later the officers of the Peti-

tioner, set out to meet the situation by organizing the Petitioner corporation (Exh. 49, Rec. 1050 ff). 493 residents of Greenhills purchased one each $10.00 membership shares.

The plan of petitioner's officers was to bid on both the Village land, and on the balance of the acreage, the bid to be based on purchase contracts signed by the occupants of the 676 units and the farmers outside the Village as far as possible, and the contracts to be signed as soon as the acceptance of the overall bid was assured.

The petitioner's officers, some of whom were professional appraisers, appraised every unit in the Village. The U. S. Government appraisal by Walter Schmidt was not known to them. When the United States gave them a total appraisal figure for the village in the negotiations, $4,252,275, petitioner's officers concluded that $3,500,000 was the highest figure they could recommend, and for that they had to jack up their valuations by about 12%. That made the residence purchases in the village alone total $3,500,000 without counting the business and undeveloped property. Petitioner undertook at the end of the 25 year mortgage period to make this up by returning that 12%, out of the final proceeds of the undeveloped residence property and the business blocks. That future liability (without interest) appeared in the petitioner's balance sheet at over $400,000.

Therefore any reduction in the purchase price from the Government's requested figure enured to the benefit of the residence purchasers. Unless this Government demand could be reduced to $3,500,000 there was no sale. If it could be gotton below $3,500,000, every purchase price of every resident would go down in proportion.

The United States government had again employed Hartzog in 1947 to revise the plan and in 1948 to prepare a Zoning Ordinance and Zoning District Maps for the Vil-

lage, through Tucker, a long-time Manager of the Greenhills operation for the Public Housing Administration and Service Director of the respondent village (Rec. 248 and 375). The prospectus then was prepared for the sale of the towns, which was made available to those interested, in September 1948 (Exh. 105, Rec. 1071). This prospectus contained the following language:

> "CONDITIONS OF SALE.
>
> "*Protective Covenants.*
>
> "The deed will contain covenants embodying the following requirements of and limitations upon the successor owners of the properties:
>
> "*Use Restrictions.*
>
> "Any development program undertaken by the purchaser (or his successor) within the corporate area shall conform to use restrictions embodied in the zoning ordinance to be adopted by the Village of Greenhills."

This prospectus was an effort by the Public Housing Administration to avoid the insistance of the House Appropriations Committee that land like this be sold without restrictions.

A memorandum dated June 11, 1948 (Exh. 66) was shown Mr. Grove, General Counsel of PHA, at his deposition, which described a conference on Greenhills in Washington at the Public Housing Administration and also laid out the first draft of the sales prospectus, later completed and in evidence as Exhibit 105 above.

> "Q. Did you participate in the discussions which resulted in this memorandum? A. I did.
>
> "Q. Can you explain from your own personal knowledge the significance, if any, of the part of that memorandum [Exh. 66] referring to the adoption of a zoning ordinance, that is, of your own knowledge of the facts? A. This provision was one of the means con-

templated by (682) which the property would be preserved in its planning aspects in the nature and in the format of which it was originally conceived. There was considerable discussion as to covenants, restrictions and other methods of tying the property up. The Agency had just been through a trying experience with other Farm Security properties and there had been passed the Andresen Bill, so-called, which relieved the other Farm Security properties of restrictive covenants, as to their use. We were trying to find a means which would achieve the result desired by those who planned the properties and at the same time not run into the same objections of keeping the Federal Government in the housing business and requiring a staff to police the operations of those who got the property."

It should be noted that the zoning ordinance itself was not simply Article VI. Out of fourteen pages of the ordinance with eighteen Articles, Article VI is only twenty-one lines on page 6 (Exh. 2, Rec. pp. 985-6). It was a comprehensive ordinance drawn by a professional planner, covering the entire village, establishing five different districts, and provided for amendments. It has since been frequently amended.

No "protective covenant" of any kind, however, was discussed with the petitioner in the negotiations, and no such covenant was placed in the contract of December 6, 1949, or in the deed of January 16, 1950 to the petitioner. The Public Housing Authority finally decided to depart from the prospectus by deeding to the Village, for nothing, the Commons, the strip of parkway land, the spoils field and the incinerator (Rec. 394).

On January 13, 1949, S. 351 was introduced by Senator McCarthy of Wisconsin for the sale of all the Greenbelt lands in the three villages. There was a companion bill in the House of Representatives, both introduced by Wisconsin representatives because of the interest of the American

Legion Posts in Milwaukee in securing veteran's housing. This bill excluded the petitioner because it was limited to veterans or other non-profit organizations, and the petitioner did not qualify under any of those descriptions (Rec. 845).

Hearings were held in the U. S. Senate Committee on February 22, 1949, and March 24, 1949 (Rec. 846, 847, Exh. 80), and in the House of Representatives on March 29, 1949 (Exh. 52). The report of the House Banking and Currency Committee followed a week later (Exh. 109), and the Senate report was published at the end of April 1949 (Exh. 79).

The House Committee report makes quite clear that the purpose of the House was to sell the properties and provide for veteran's housing (Exh. 109, Rec. 1114).

The bill was amended so that the Public Housing Administration was willing to accept the bid after petitioner changed its corporate setup.

P. L. 65 was passed thereafter and signed May 19, 1949 (Exh. 24, Rec. 977). It contained the following language, put in by the Senate Committee:

> "The Commissioner is authorized, as a condition of any sale hereunder, to transfer, or to require the transfer or an agreement for the transfer of, streets, roads, public buildings, federally owned utilities, playgrounds, swimming pools, and parks, including adequate open land surrounding or adjacent to each project, to the appropriate non-Federal government agency, at such times, to such an extent, and upon such terms and conditions as he shall determine to be in the public interest."

Hearings had been proceeding before the Greenhills Planning Commission and City Council on the Zoning Ordinance and the essential zone maps. It must be understood

that a zoning ordinance by itself is meaningless; it only acquires meaning when applied to a piece of ground shown on a map as in a particular zone.

This ordinance had been endorsed by the petitioner in a letter to the Village on August 11, 1948 (Exh. 35, Rec. p. 1126). Karl Pfirrmann was a member of the Planning Commission for eight years from 1948, as well as a director of the petitioner from May 1949 to early 1950. He testified for the respondent (Rec. p. 306). There is much testimony that GHOC did not oppose the ordinance at any time. Stamm, Vice-President of petitioner, testified what he did (Rec. pp. 1129 & 1130):

> "Q. Prior to the adoption of that ordinance on August the 2nd, 1949, did you appear before the Planning Commission or the City Council and urge the adoption of that zoning ordinance? A. Yes, I did on a number of occasions. I appeared before the Planning Commission and I also urged the adoption of a zoning ordinance for the Village of Greenhills. I was at odds with the Planning Commission on this particular ordinance because of not so much of the ordinance itself but because of the map which accompanied it, the zoning map, which zoned property which our company was negotiating to purchase from the Federal Government and which showed parts of our property, property which we hoped to acquire, as Greenbelt, and I could foresee the difficulties of owning property that would be zoned Greenbelt and, therefore, not usable, but upon which we would have to pay taxes and assume all of the other responsibilities. I was always in favor of zoning for Greenhills, as I am in favor of zone for any community.
>
> "Q. You, at no time—did you, at any time, urge the adoption of Article VI which deals with the Greenbelt? A. My attitude on this was, after having numerous meetings with the Planning Commission and members of council, was that there should be a zoning ordinance. I violently disagreed with Article VI and, however,

I finally came around to the point, since I could not get any agreement with the Planning Commission, that we should adopt it because I had been assured that Article VI, and from my own experience, I felt that Article VI was completely unconstitutional, and I felt, and I so informed the Planning Commission, that since there were provisions in the ordinance for amendments, we could always take out this objectionable feature.

"Q. You wanted the zoning ordinance adopted befor the Greenhills Home Owners Corporation purchased the property? A. Yes, I did, because for two reasons. As I have stated before, I think any community which is going to grow, and it was obvious that Greenhills was going to grow, should have a zoning ordinance, even if it were not going to grow, for the simple protection of what was there. They should have a zoning ordinance. I was very much in favor of a zoning ordinance, as I always have been. I did object to this Article VI, and the zoning map which accompanied the ordinance, which indicated private property was to be zoned Greenbelt."

This is all the testimony on the support of the ordinance by GHOC.

On June 15, 1949, the petitioner made an offer for the purchase of 3400 acres of Greenhills, omitting the 121 lots already sold off by the government (Exh. 81, Rec. p. 1029). To this offer was attached its own prospectus with reference to the Greenbelt land as follows:

"D. Park and Public Areas; Greenbelt.

"The corporation will endeavor to convey all interior parks and playground areas as presently delineated on the Greenhills plan of development to the Village of Greenhills, and without charge. *Similarly, the corporation will convey such portions of the Greenbelt area within the corporate limits as are not suited to development to the Village (or to other appropriate agencies of local government).*" (Our emphasis.)

This was directly contrary to the U. S. Prospectus of September 1948 referred to above.

The proposal was subsequently carried out by Petitioner by the conveyance to the Village of all interior parks, and some 29 acres of Greenbelt to the Hamilton County Park Board, to close the only gap and complete the green area around the Village.

The offer was discussed in July 1949 in Washington, and on July 21, 1949, Egan, Public Housing Commissioner, replied to the offer in Exhibit 45 (Rec. 1175), indicating what in it was not acceptable.

Especial note should be taken of the next-to-last paragraph of this letter.

> Another item which should be considered by your corporation is that no credit can be given to the purchase price for the project, or any part thereof, for amounts which may have to be expended by the purchaser to correct deficiencies in the property, regardless of whether such deficiencies resulted from original construction defects or deferred maintenance, as the Government's appraisal of the project has been made as an "AS IS" basis and did not consider the value of the properties after improvements or corrections are accomplished.

"AS IS" in this paragraph was carried over into the mortgage and deed. It did not apply to "restrictions," but to defective roofs. (See Rec. 1213.)

It will be noted that throughout this long letter of five single-spaced pages there is no reference whatever to Greenbelt, to any zoning ordinance, or to anything except two major matters, (1) the provision of housing for veterans, and (2) the assurance of the necessary financing to produce those houses.

It should also be noted that these requirements in the letter of July 25 from Mr. Egan (Exh. 45, Rec. 895) were

fully satisfied by Mr. Taft's letter to Mr. Egan of November 2, 1949 (Exh. 47, Rec. 902), and his letter of November 7, 1949 (Exh. 48, Rec. 908).

On August 2, 1949, the Zoning Ordinance was passed. There is no evidence of any appearance by United States Government representatives in support of the ordinance during the 1949 hearings and consideration by the Village Council, and no written statements from Mr. Egan or the Public Housing Administration to the Village during this period, endorsing the ordinance. Mr. Stamm, the Petitioner's representative in the matter of the Zoning Ordinance, stated without contradiction that he did not know the government was pressing this ordinance, that he never heard any representative of the government say he was in favor of it (Rec. 1139).

Additional negotiations between Petitioner and the Government took place, of which the most important involved a meeting in Washington early in August 1949. On August 11, 1949, Mr. Taft, Mr. Russell and Mr. Tucker (at that time a director of Petitioner corporation, but no longer employed by U. S. or by the respondent), at least, were in Washington representing the Petitioner. Mr. Taft testified from his original notes made at the time, that since this was a wholesale purchase instead of a retail purchase, and since the Schmidt appraisal of the government made in September 1948 was on a retail basis, all items should be reduced by 25%. The government figure was $4,252,275 on this basis. The athletic field, the Damon Road site for a school and the Commons should be taken off this wholesale total. Additional small items were also taken off and this reduced the government figure to $4,037,400 (Rec. 851-853).

The problem for the Petitioner was how to bridge the gap between this figure of $4,037,400 and the maximum

which the Petitioner could pay $3,511,000. Every argument had to be used, but the Plaintiff was in no way concerned with the manner in which the government might reconcile its figures for the purpose of accounting to the Treasury or the General Accounting Office. The Greenbelt was an obvious place to begin.

Apparently, the government figures indicated a valuation of $299.00 an acre for 495 acres on which new residential buildings could be put. A considerable portion of this was Greenbelt, and the discussion then proceeded on the valuation of the Greenbelt. It is clear that the government appraisal, presumably the Schmidt appraisal, did put a value on this Greenbelt property (Rec. 853). The Plaintiff's representatives stated that they figured 164 acres only were usable under the Zoning Ordinance. Taking off 331 acres at $299.00 an acre, totalling approximately $100,000, brought the figure the government was asking to $3,937,400 (Rec. 853). The Petitioner's representatives then said to the government, "we can't give you more than $3,511,000, no matter what the arguments are." The government did not, at that time, accept the GHOC figure (conceding another $426,000), but the Plaintiff did make an offer of this figure, $3,511,000, in its amended proposal of August 25, 1949 (Exh. 54), restricted to the Village and omitting the other 2900 acres. This offer and all of these negotiations were on the basis of the valuation less the 121 lots already sold, but plus a small tract on the southeast side of the Village, outside its boundaries, approximately 500 acres in all.

There was no disclosure in these negotiations of how the government handled the valuation of portions of the property covered by the offer which was later accepted. There is certainly no evidence that the government was permitted to or did, in its accounting of the sale, place a value of

"nothing" on the 331 acres of Greenbelt. In the letter of acceptance of September 9, 1949 (Exh. 161, Rec. 964), Mr. Egan wrote as follows:

> Provisions will be considered for the release of portions of the project from time to time upon payment of an amount for application on the lien indebtedness based upon the determination of the Government's expert as to the value of such portions of the project and after due consideration to possible severance damage to the remainder of the project.

When GHOC in the spring of 1950 asked permission to sell a piece of Greenbelt for an oil station, the United States Government gave their permission and fixed a release price of $12,000.00 (Exh. 70, Rec. 1160). It *did* include the Greenbelt in the purchase mortgage it took from the Plaintiff (Exh. 6).

Early in September 1949 it was indicated that the government would accept the proposal, and on September 9, 1949, the letter of acceptance was sent (Exh. 161, Rec. 1189), supplemented by a later letter of September 15, 1949 (Exh. 110, Rec. 1195). The Petitioner's officers and helpers at once went to work on the 676 occupants of the government's residence units to secure their signatures on purchase contracts. This was achieved as the culmination of many hours of day and night work on the part of the Petitioner's officers and stockholders, and resulted in purchase contracts covering all but a few thousand dollars of the three and one-half million. This balance was covered by an undertaking by the Plaintiff itself to purchase two old farm houses on the property which were not going to anyone else.

On December 6, 1949, the contract was signed with the United States (Exh. 4, Rec. 1022), accompanied by the Russell affidavit of the work performed by the Greenhills officers and stockholders in connection with the operation.

No covenant appeared in this contract mentioning a Zoning Ordinance as a use restriction as required in the 1948 prospectus (Exh. 105, Rec. 980). On January 16, 1950, the United States executed the deed to the property to the Plaintiff, effective as of January 1, 1950 (Exh. 5, Rec. 1037), and at the same time Plaintiff executed a mortgage to the United States (Exh. 6). On the same date the United States executed a deed to the excepted school properties to the Greenhills Board of Education (Exh. 22). Neither of these documents contained any covenant about any Zoning Ordinance as a use restriction, and the School Board under Ohio law is not subject to a Zoning Ordinance.

On August 11, 1950, the United States Government, pursuant to P. L. 65, transferred acreage to the County Park Board (Exh. 108A, Rec. 992), and on November 7, 1950, the United States Government, under P. L. 65, conveyed additional acreage to the County Park Board (Exh. 108B, Rec. 994). On February 13, 1952, the United States Government, under P. L. 65, conveyed additional acreage to the County Park Board (Exh. 108C, Rec. 990).

On February 29, 1952, the Plaintiff conveyed to the County Park Board 29 acres (Exh. 94), which conveyance completed the County Park Board's park area surrounding the Village, and now described as Winton Woods Park. This is a permanent Greenbelt around the Village as called for and promised in 1949 (Rec. 1554); and see opinion of Court of Appeals Appendix B, *infra*, p. 69. Some additional acreage surrounding the Village is retained by the U. S. Corps of Engineers for the dam and lake in this area.

All of these conveyances to the County Park Board, and perhaps part of the property turned over by the Public Housing Administration to the U. S. Engineers for the dam and lake, are shown in Exhibit 1 in green (Rec. 1336). This park total was 1985 acres or three times the area of the Village and six times its original greenbelt district.

In April 1951 agreement was reached by which Connecticut General Life Insurance Company would pay off the United States, and the United States would transfer and assign the notes and mortgage to it. This was consummated on October 10, 1951 (Exh. 30, Rec. p. 1257).

REASONS FOR GRANTING THE WRIT

The Ohio Supreme Court has avoided deciding the constitutionality of a zoning ordinance severely restricting the use of private property by limiting its use for practical purposes to farms, allotment gardens, public park and recreational uses.

There are a number of cases recently decided in state courts either similarly restricting use to wild life preserves (*Morris Co Land Co.* v. *Township* (1963), 40 N. J. 539, 193 Atl. 2d 232); or requiring extremely low density in residence zones—4 acres for a single family unit (*Natl. Land and Investment Co.* v. *Kohn* (1966), 419 Pa. 504, 215 Atl. 2d 597). These are important issues which should be decided authoritatively by this court, in the same way that the standard of all zoning cases was set by *Ambler* v. *Euclid.*

The Ohio Supreme Court has based this avoidance on the doctrine of estoppel, upon the general theory of the case of *McKinney* v. *Carroll* (1838), 2 Peters 66, citing Ohio assessment cases.

In order to achieve this result the Ohio Court has perverted and ignored the undisputed facts in the record to an extent which clearly constitutes a denial of due process. The errors are gross and obvious and arbitrary. They are in no sense a mere weighing of conflicting evidence.

We shall discuss these major issues by taking each of the Questions Presented in order. We submit that these are questions of important substance not heretofore decided by

this Court; in important respects the decision of the Ohio Court is not in accord with *McKinney* v. *Carroll, supra,* and the many cases relying on it.

ARGUMENT

Question 1. *Whether a "greenbelt" provision of a zoning ordinance which permits the land in that zone, owned privately by petitioner, to be used only for "a. Public park reservation, and playground. b. Public recreational buildings. c. Allotment gardens, farm, nursery, gardens. d. Public utilities. e. Bus passenger station. f. Signs erected by public authority," is a violation of the United States Constitution.*

This Court should answer this question in the affirmative.

There can be no possible doubt that on its face Section VI of the Greenhills Village zoning ordinance is unconstitutional as applied to property about which the only testimony is that its best use is for residence purposes.

In its opinion the trial court said (Appendix B, *infra* p. 57):

> "If this were the usual case of zoning property while exclusively in private ownership, the contention of the plaintiff [petitioner] would have to be sustained."

The Court of Appeals, of course, held the ordinance to be unconstitutional.

The Supreme Court of Ohio in its Syllabus 3 wrote:

> "Whoever (1) insistently encourages, solicits and procures a municipal corporation to adopt a comprehensive zoning ordinance, notwithstanding that that part of the ordinance is objectionable which restricts the use of a portion of the land affected thereby to public park and recreational use only, . . . is estopped from invoking the judicial power." (Appendix B, *infra* p. 81.)

However, apart from the courts below, we submit that any ordinance which so restricts the use by a private owner is a taking of property without compensation, and has no relation whatever to public health, safety and welfare.

The respondent has *not one case* to support its position that zoning for primarily public purposes is constitutional. It frequently quotes general statements as to the desirability of a greenbelt (which respondent already has in abundance) and before the Ohio Supreme Court cited *State* v. *Bruestle*, 159 O. S. 13 as a landmark case.

It is a landmark case all right, but on eminent domain, not on zoning. Judge Taft's opinion laid down the rule that redevelopment to eliminate slums is within the public welfare, and public money and eminent domain may be used. It can hardly be cited as a license to confiscate property.

We strongly maintain that the case in this country which shows the farthest a municipality has tried to go with zoning (except Greenhills, Ohio) is the case relied on by the Ohio Court of Appeals from the Supreme Court of New Jersey, *Morris County Land Improvement Co.* v. *Township of Parsippany, Troy Hills*, 193 Atl. 2d 232, 40 N. J. 539, which is discussed in the opinion of the Ohio Court of Appeals, a case decided after the trial judge had decided the Greenhills case.

The syllabus of that case was quoted by the Ohio Court of Appeals as follows:

> "Private property may not be taken for public use without just compensation."
>
> "Township zoning ordinance which greatly restricted use of swampland and had for prime object retention of land substantially in its natural state, essentially for public purposes such as floodwater detention basin and preservation of wetland wildlife sanctuary constituted an unconstitutional taking of land for public purpose without just compensation."

> "Zoning ordinance which so restricts use that land cannot practically be utilized for any reasonable purpose or where only permitted uses are those to which property is not adapted or which are economically infeasible is ordinarily confiscatory and beyond police power and statutory authorization."

In addition, we wish to point out the basic facts of the case. The federal government had expressed some interest in spending money to create a wildlife sanctuary in New Jersey, but had not made up its mind. The local authorities decided to preserve the tract in contemplation of the hoped-for federal money by zoning it "wetland wildlife sanctuary" and the like; No, said the New Jersey Supreme Court. If you want the property, pay for it. You have eminent domain. Confiscating it by zoning is unconstitutional.

Other than the fact that Greenhills has no plan or proposed use for the property in the within cause, we believe the cases to be on all fours, particularly since it was admitted throughout that Petitioner had been deeded the property.

We would like to point out that if the City of Greenhills has a pressing need to have its 695.60 incorporated acres surrounded by 2088.6 acres of park and recreation instead of merely 1985 acres, the procedure is fully covered in Chapter 755 of the Ohio Revised Code, which deals in detail with municipal organization and operation of parks and recreation. Just one of these statutes, O. R. C. Sec. 755.12 provides as follows:

> "The legislative authority of a municipal corporation or the board of county commissioners of any county may designate and set apart for use as playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers, any lands or buildings owned by any such municipal corporation or county and not dedicated or devoted to other public use. Such

> municipal corporation or county may, in the manner provided by law for the acquisition or land or buildings for public purposes in such municipal corporations or county, acquire lands or buildings therein for such use."

A reading of the entire chapter reveals no mention of zoning whatever.

We are forced to the conclusion that since this respondent City admits petitioner's ownership of the property in question, which means the petitioner could fence it and keep off trespassers, it has the bald objective of *preventing* use and not regulating it in a reasonable manner.

It is clearly the law as determined by the courts, from which there does not appear to be any dissent, that the zoning ordinance would not have any effect on the Government of the United States. It could build a post office or any other public building no matter what the zoning ordinance held. The United States being a sovereign power, under the doctrine of supremacy of power, a state statute or local ordinance or regulation must yield in case of any conflict.

The leading case is that of *United States* v. *Chester*, 144 F. 2d 415 (CA 3), decided July 17, 1944. A congressional enactment authorized the Federal Works Administration to proceed with the construction of emergency housing without regard to the application of city building regulations. The city of Chester refused to permit the contractor for the federal government to proceed with the construction until the contractor had complied with the building and zoning regulations. The United States obtained an injunction against interference by the city officials in the District Court and thus was affirmed by the Court of Appeals for the Third Circuit. The court said at page 420:

> "A state statute, a local enactment, or regulation or city ordinance, even if based on the valid police powers

of a State, must yield in case of direct conflict with the exercise by the Government of the United States of any power it possesses under the Constitution."

It is thus clear that a governmental agency with the power of eminent domain cannot be compelled to follow zoning regulations. This immunity is clearly stated in *Yokley, Zoning Law and Practice* (2d edition) Section 39, pp. 65-70.

The United States was, therefore, not bound by any of the provisions of the Greenhills zoning ordinance adopted August 2, 1949, even though drafted by Justin Hartzog or anyone else. Neither in Public Law 65 nor in any other provision of the laws does it authorize the United States to place any restrictions on the sale other than the right to convey properties to non-federal governmental agencies.

However, even though the United States owned the property when the zoning ordinance was adopted on August 2, 1949 this fact did not wipe out the provisions of the zoning ordinance. They were effective as against any one but governmental agencies, if otherwise valid.

Consequently while the Government was not bound by any zoning ordinance when it sold the property to the Greenhills Home Owners Corporation, the latter was bound by all *valid* provisions of the zoning ordinance when it acquired the property.

It was, however, a zoning ordinance and nothing more, subject to being amended at any time. If any provision were invalid or unconstitutional the court could be asked to so declare void such provisions, which is just what the petitioner has done in these cases. If there would be changed conditions, resort could be had to the Court for changes. There was nothing in Public Law 65, the contract, deed or mortgage which made reference to the zoning ordinance of August 2, 1949 to give it any greater sanctity than any other zoning ordinance. The United States was

not bound, and neither was the City of Greenhills which could act without even amending the ordinance.

A host of Federal and Ohio cases have always connected zoning closely with a reasonable exercise of the police power in that the restriction imposed must bear a substantial relation to the public health, safety, morals or general welfare. If it does not bear such a relation, it is a taking contrary to the federal and state constitutions. See *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 ALR 654; *Perrin's Appeal*, 305 Pa. 42, 156 Atlantic 305, 79 ALR 912; *Marshall* v. *Salt Lake City*, 105 Utah 111, 114 Pa. 2d 704, 149 ALR 282; *Youngstown* v. *Kahn Bros. Building Co.*, 112 O. S. 654, 148 N. E. 842, 43 ALR 662. In the latter case the Ohio Supreme Court held:

> "The police power, however, is based upon public necessity. There must be an essential public need for the exercise of the power in order to justify its use. It is commendable and desirable, but not essential to the public need, that our esthetic desires be gratified."

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322, Mr. Justice Holmes wrote as follows:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment (*See Hariston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 605, 28 S. Ct. 331, Ed. 637). When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. While such regulations

> may not physically take the property, they do so regulate its use as to deprive the owner of a substantial right therein without compensation. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

In a similar vein, Mr. Justice Stern in *Commonwealth* v. *Zasloff*, 338 Pa. 457, 13 A. 2d 67, 128 ALR 1120, commented:

> "As the highest attribute of government, the police power must, at all times, be exercised with scrupulous regard for constitutionally guaranteed private rights."

Therefore we insist that the only proper decision under the pleadings and under the established law was whether or not Article VI is a proper expression of the police power in Greenhills, Ohio, at the present time.

Question 2. *Whether the interpretation by the Supreme Court of Ohio of the undisputed facts in the record in order to provide the basis for their decision on estoppel on Questions 3, 4, and 5 below, in itself constituted a denial of due process.*

This Court should hold that it does.

A. The opinion in the Ohio Supreme Court included the following:

"However, prior to its purchase of Greenhills, GHOC determined to see to it that zoning was adopted. It engaged the same planner who had designed Greenhills for the United States to draft an ordinance incorporating his concepts of a model community which were the basis of his original plan and which included the greenbelt. It presented that draft to the proper Village authorities for consideration. It delegated its Vice-President and member of its Board of Directors, Charles Stamm, as its permanent

emissary to the planning commission and council of the Village in the matter of the adoption of that draft." (Appendix B, *infra* p. 81.)

This is wholly incorrect. Throughout the long printed record in the Ohio Supreme Court (three brown volumes helter skelter printed by respondent, and one green volume, arranged chronologically, printed by petitioner), there is not the slightest evidence to support these statements. We quote only a few of the many references:

Lawrence Tucker, a witness for respondent, was both the U. S. Manager of Greenhills and the respondent Village Service Director until December 1948.

[Rec. p. 251]

"Q. You may state to the Court whether or not, as an employee of the Village of Greenhills, you entered into any arrangement with Mr. Hartzog to draft a Village zoning ordinance? A. I did.

"Mr. Beirne: I have got the original and I want to return it, but I have Thermofax copies, your Honor.

"Mr. Taft: There is no objection.

"Mr. Beirne: Mark this for identification.

(Thereupon the document above referred to was marked for identification Defendant's Exhibit No. 62.)

"Q. I hand you what has been marked for identification as Defendant's Exhibit 62. Mr. Tucker, I have a copy which is signed by you and purports to be signed by Mr. Hartzog, and I have a Thermofax copy for the record to be substituted for it. Will you tell us what that is, please? A. This is an offer of employment of Mr. Hartzog to prepare a zoning ordinance for the Village of Greenhills, with his acceptance.

"Q. And is that document which you are looking at, does it bear your signature and Mr. Hartzog's signature? A. It does.

"(538) Q. And that is dated November 20, 1947, I believe? A. Yes, sir.

"(539) Q. Now I direct your attention, Mr. Tucker, to the third paragraph of that letter which has been received in evidence as Defendant's Exhibit 62. A. Yes, sir.

"Q. You will note that refers to a zoning map. A. Yes, sir.

"Q. And what is the zoning map to which that refers? A. That was a map prepared by Mr. Hartzog, with his recommendations as to zones with restrictions as to land use drawn in conformity with the master plan he had prepared for the Village under his agreement for employment by the Federal Government.

"Q. So the zoning map to which that refers is the zoning map that Mr. Hartzog prepared, not for the Village but for the Public Housing Administration; is that correct? A. As I recollect, yes, sir.

"Q. And is that the map, as far as you know, a copy of which is attached to the Hartzog report, which is received in evidence as Defendant's Exhibit 61? You might want to look at it. A. I find a copy of the master plan, but I do not find a copy of the zoning map.

"The Court: Do I understand by this question that when he prepared it for the Village for the zoning, he didn't prepare a new map, he followed the map which was prepared (540) for the Housing Administration?

"Q. Is that correct? A. Your Honor, to the best of my knowledge and recollection, he prepared both a master plan and a zoning map for the Federal Government. The zoning map being related to the master plan. He then prepared for the Village a zoning ordinance, which wrote out the intended use limitations as defined by the zoning map.

"The Court: Conforming to the original map?

"The Witness: Yes, sir.

"Mr. Beirne: You might want to look at that third paragraph in connection with that evidence, if the Court please.

"Q. Now, do you know whether or not Mr. Hartzog did prepare a zoning ordinance for the Village of Greenhills pursuant to the terms of this agreement

outlined in Exhibit 62? A. He did.

"Q. And so far as you know, did the zoning ordinance which he prepared conform to the zoning map which he had prepared for the Public Housing Administration? A. Yes, sir, he did.

"Q. And did you see the zoning ordinance? A. Yes, sir.

"Q. Can you tell us whether or not the original draft of the zoning ordinance which was prepared by Mr. Hartzog pursuant (541) to the terms of this agreement, Defendant's Exhibit 62, included a district known as the Greenbelt district? A. It did.

"Q. And are you familiar in general with the restrictions of Article VI of the zoning ordinance of the Village of Greenhills relating to the Greenbelt district, which is the subject of this lawsuit? A. Yes, sir, I am generally familiar with it.

"Q. Can you tell the Court whether or not the original draft prepared by Mr. Hartzog had that provision in it? A. It did.

"The Court: Draft of the ordinance you mean?

"Mr. Beirne: Draft of the ordinance with Article VI relating to the Greenbelt district.

"Q. And was that the same, or substantially the same, as it is in the present ordinance which is under attack in this case? A. I believe that it is."

Mr. Bernard L. Grove, a witness for respondent, was General Counsel for the Public Housing Administration at that time and he testified by deposition in Washington as follows (Rec. p. 339):

"Q. Do you know of your own knowledge, Mr. Grove, whether or not Mr. Hartzog actually prepared and submitted a master plan for the Public Housing Administration as provided for in this memorandum marked Defendant's Exhibit 2? A. He did.

"Q. Do you know of your own personal knowledge whether or not, as a part of that master plan, Mr. Hartzog prepared a pro- (679) posed zoning ordinance

for the adoption of the Village Council that is, the Village of Greenhills? A. He did."

Mr. Russell, President of petitioner, called as on cross examination by respondent, testified as follows (Rec. 46-49):

"Q. As a matter of fact, as the President of this corporation, you were vitally interested in the adoption of the zoning ordinance by the Village before your corporation acquired title to the property if it were the successful purchaser, isn't that true? A. Not entirely. I was interested in the adoption of the zoning ordinance in the community in which I lived for that purpose. The fact that it served another purpose was incidental at the time I lived there. My family was there and I was raising my children there. So I would be interested, as any community (154) I lived in, in the adoption of a zoning ordinance; yes, sir.

"Q. So, naturally, we would assume that all the people who might become owners in the Village that they were then renting would be interested in the zoning ordinance which was under consideration, because it would affect their property if they bought? A. Certainly.

"Q. But in addition to that, Mr. Russell, as the President of this corporation that had been organized to buy all of this property from the United States, you were vitally interested in the adoption of a zoning ordinance before you acquired—before your corporation acquired title to the property, isn't that true? A. We were interested in the adoption of a zoning ordinance, yes, sir.

"Q. Now, the ordinance was under consideration by the Village for several months before it was finally adopted, wasn't it? A. I presume so. I don't know.

"Q. And you probably knew, did you not, Mr. Russell, that the actual drafting of the ordinance had been done by Mr. Justin Hartzog? A. Mr. Beirne, I think the first that we found out the part the govern-

ment played in the adoption of the zoning ordinance was at Mr. Groves' deposition in Washington, when they (155) told us that they not only had an ordinance but they paid for it. This was somewhat a surprise. We thought this originated with the people in Greenhills, and I was under the impression all along that the Village of Greenhills paid Justin Hartzog to prepare it. I didn't know this until I was in Washington.

"Q. Let me put it this way to you. It was your understanding then in 1948, when the zoning ordinance was first being discussed, that the actual drafting of the ordinance had been done by Mr. Hartzog, but you thought that he was being paid by the Village for that work? A. Yes, sir.

"Q. And you know that during that period of time, between the original submission of the draft of the ordinance by Mr. Hartzog to the Village and the final enactment, there were numerous hearings that were held by City Council and by the City Planning Commission relating to the draft of the ordinance that was submitted by Mr. Hartzog? A. I would certainly think there would have been, yes, sir.

"Q. Well, wasn't this really general knowledge in the community? A. Yes. I believe Mr. Stamm attended some very preliminary discussions on the Planning Commission to draft the areas that, I believe, at the time that they felt should be given to the Village. That was at the beginning, and I think we have a record to that effect, yes, sir.

"Q. And Mr. Stamm was acting as Vice-President of the Greenhills Home Owners Corporation? A. In this particular case he was asked to attend the meeting to ascertain just what was necessary to continue the municipal operation if the Federal Government sold it. And among the things, as I recall, and we have the records here I believe, that they asked for such things as the fire trucks and the street cleaning equipment and such facilities as that to (157) continue the municipal operation. And I believe in the same committee they were discussing the zoning ordinance.

"Q. And when you say Mr. Stamm was asked to attend, you mean he was asked to attend by the Board of Directors of the Plaintiff corporation, GHOC? A. That was a duty that he was assigned to in this specific meeting, yes. This was a meeting.

"Q. And that meeting related to the zoning ordinance, among other things? A. I believe we did discuss the zoning ordinance."

On August 5, 1948 a meeting of the Village Planning Commission was held, apparently the one Mr. Russell was talking about, and the minutes appear as Exhibit 73 (Rec. p. 928):

Greenhills, Ohio
August 5, 1948

"SPECIAL MEETING

Council met in special session on the above date. President Williams presiding.

Present were councilmen Harrison, Geisen, Steinway and Schmidt. Also present were the director of service, solicitor and clerk.

Minutes of the meeting of July 20, were read and accepted on motion by Mr. Geisen and seconded by Mr. Schmidt.

Mr. Schmidt moved that ordinance #A-176 'To Pay Bills' be adopted. Seconded by Mr. Steinway. The vote, yea: Messrs. Harrison, Geisen, Steinway and Schmidt.

Present [President] Williams announced that he was ready to appoint the members to the planning commission. Since council is to elect one member to serve for the duration of his term in office he asked for nominations.

Mr. Steinway nominated Mr. Harrison. Seconded by Mr. Schmidt. Mr. Geisen moved that nominations be closed. Seconded by Mr. Schmidt. The vote, yea: Messrs. Geisen, Steinway, Schmidt and Harrison.

President Williams appointed the following to the planning commission:

Arthur Kolhman ..... 6 years
J. J. Kushman ..... 4 years
Karl Pfirrmann ..... 2 years

The Mayor is also a member of the duration of his term of office.

Mr. Harrison in his budget report to council stated that the Village would have to include in future budget appropriations the present services now rendered by the Public Housing Administration. He also pointed out that the village tax rate was less than that of Cincinnati but that the school tax rate is higher.

Mr. Geisen reporting for his special committee, which was appointed for the purpose of apprising the President and other Government officials of the plight the village would be in if the sale proceeded on the present high dollar value. He stated that he selected representatives from each block and the veterans organizations and the school board to serve on his committee. Twenty organizations of the village were contacted to send wires asking for reconsideration of the method of disposal. Mr. Geisen read correspondence from Mr. Taft, Mr. Hess, and Mr. Egan.

The board of directors of the Greenhills Home Owners Corp. were present at this meeting. Mr. Stamm acting as their spokesman, requested Council to draw up a list of items and properties in resolution form which they thought would be necessary to carry on public services. He stated that in event of their successful bid they would immediately transfer these to the village. This they would put in writing now.

Mr. Stamm suggested that council immediately adopt a building code and a zoning ordinance.

Mr. Schmidt had to leave at this point and the meeting was adjourned for lack of quorum.

Adjourned at 8:50 P.M.

W. H. WILLIAMS
President

A. ADAMS
Clerk"

On August 11, Mr. Russell confirmed the position taken on August 5 by letter to the Mayor (Exh. 35, Rec. p. 975):

August 11, 1948

Hon. Wm. H. Williams
Mayor, Village of Greenhills
7 Alcott Lane
Greenhills, Ohio

Dear Sir:

At the special meeting of Village Council August 5, 1948, officers of this corporation made several suggestions which, for lack of a continued quorum in council, could not be acted upon.

We are of the opinion that expeditious action is required by council in order to safeguard the continued efficient operation of community services when the Federal Government liquidates its interests in the Greenhills project. We respectfully recommend, therefore, that two committees be appointed at the council meeting of August 17, 1948 to study the following problems:—

a. Determination of those specific facilities such as machinery, equipment, tools, office space, etc. essential to the continued operation of the village government. Also determination of specific park areas, easements, etc. which to the best interests of the village should be under municipal ownership or control.

b. Study of the electrical distribution system with respect to municipal ownership and operation. We believe that a possibility for revenue to the village government exists.

For appointments to these committees, we respectfully offer for your consideration one man for each who have made extensive studies of the problems involved in each case. For committee (a) we offer Mr. Chas. Stamm whose qualifications and work along this line for the City of Cincinnati we are sure you are aware of. For committee (b) we offer Mr. Bernard Merriss of Greenhills, an engineer who has made a thorough study of the electrical problem, a report of

which is a matter of record with and available from our files.

We feel that these studies would be beneficial to the village government regardless of who the ultimate purchaser of the Federal Government interests may be. Please be assured that we feel that the interests of the village government and the Greenhills Home Owners Corporation are parallel in these respects.

We would also like to take this opportunity to reiterate our concern for prompt action by the Planning Commission for enactment of proper zoning and building code restrictions. We feel that the protection of village interests definitive action should be taken by the council prior to the sale of the community.

In the event that you may be absent from the meeting of council on August 17th, may we suggest that you inform the Vice-Mayor of your thoughts on those matters.

Sincerely yours,

/s/ J. F. RUSSELL, *President*
GREENHILLS HOME OWNERS CORPORATION

Russell outlined his reasons for the position on the zoning ordinance at p. 215 of the Record (cross examined on his previous testimony by deposition):

"Q. Now, let's go on. The next question I will ask you if Mr. Beirne didn't ask you:

'Who were the representatives of this plaintiff corporation that appeared before the Planning Commission and the Village Council when the question of the adoption of the zoning ordinance was under consideration by those two bodies?'

"And I will ask you if you didn't answer:

'I don't know as we designated any particular person. One thing you would have to bear in mind, that the Village apparently was going to be sold, and I know we as the members of the corporation or as individuals living in the community were vitally interested in what was going to happen to our community,

but not necessarily as an officer of the corporation, because in our capacity of trying to develop a program to purchase this thing, we did uncover or discover what was happening to many other communities that had been sold,—that the zoning ordinance had never been prepared, and other conditions that made the community almost unlivable, as we would like to see it exist, and as a consequence we took advantage of that information to urge the Village of Greenhills to avoid the same pitfalls.

"So, we, as a corporation asked them to do it, (455) and many of our corporate officers or representatives could have urged the same thing, mainly because they knew what had happened before and we were confident the people running the Village at that time did not have that information available to them."

Karl Pfirrmann, a witness for respondent village, was a member of the Village Planning Commission for eight years and a director of petitioner for some 9 months to a year. He described meetings of the voluntary citizens planning committee and of the Planning Commission which succeeded it (Rec. pp. 294-299). He testified:

"Q. Now, do you know whether or not any representative of the Greenhills Home Owners Corporation attended any of the meetings of the Mayor's planning committee, of which you were a member? A. Numerous people attended, and I do recall Mr. Stamm and Mr. Russell attended a couple of these meetings.

* * * * * *

"(617) Q. Did they make any objection to any parts of the ordinance? A. They did not.

"Q. Were the Greenbelt provisions of the ordinance discussed among the other provisions in it? A. They were.

"Q. Now, as noted here on Exhibit 73, you were appointed as a member of the Planning Commission in August of 1948 at a special meeting which was held

for that purpose, and I believe you have testified that you remained as a member of that commission for what was it, eight years? A. Eight years, yes, sir.

"Q. Now, as a member of the Planning Commission, Mr. Pfirrmann, did you and your fellow members continue the study of the zoning ordinance as it had been prepared by Mr. Hartzog? A. We did.

"Q. And did you hold public meetings? A. There were a number of meetings held which were open to the public, and actually prior to the time that the ordinance was presented to Council for adoption, there was a public—there was an advertised public hearing. I don't know the date of it, but I recall there was an advertised public hearing to (618) discuss the zoning plan in its entirety.

"Q. Was the hearing held? A. Yes, it was.

"Q. Was it attended by members of the public? A. It is hard to remember this far back, but I am sure——

"Mr. Taft: Excuse me, can you fix the date on this?

"Mr. Beirne: I was just going to ask him. It would be sometime after August, 1948.

"Mr. Taft: Well, it is quite a long time, that is why I think it ought to be fixed before he testified about it, your Honor.

"Q. I am referring to the period of time now, Mr. Pfirrmann, if you can recall, of approximately a year. You were appointed with your fellow members on August the 5th, 1948, and it is a matter of record in this case that the ordinance itself was adopted on August 2nd, 1949, so that we are concerned now with the activity of the Planning Commission during that year before the adoption of the ordinance. A. I would place that meeting sometime, I think, in April.

"Q. Of 1949? A. Of 1949, yes, sir.

"Q. That would be then after the—strike that. You were down in Washington at one or more of the hearings of the Committees of Congress that were concerned with the passage of (619) Public Law 65? A. I was, yes, sir.

"Q. Now, I think it is a matter of record that was in March of 1949. Was the public meeting of the Planning Commission after the time you were down in Washington, if you recall? A. Not for certainty.

"Q. Your best recollection is it was sometime in April? A. It probably would be in April, yes, sir.

"Q. Were any of the officers of the Greenhills Home Owners Corporation present at the public meeting of the Planning Commission, if you recall? A. I would have to assume they would be.

"Q. You have no specific recollection of that? A. I have no specific recollection of that.

"Q. Well, in any event, after you studied the ordinance that was prepared by Mr. Hartzog, can you state whether or not your commission recommended its passage? A. We did.

"Q. Now, was there any other alternate zoning ordinance which had been submitted by anybody else, other than the Hartzog draft? A. No, there wasn't.

* * * * * *

"Q. Was there ever any objection made by any of the people that appeared before the Planning Commission, or the planning committee, to the Greenbelt provision of the zoning ordinance that you were studying? A. None.

This is the record on the basis of which the Ohio Supreme Court's opinion reads (5 O. S. 2d 207, Appendix B, *infra*, p. 84):

"However, prior to its purchase of Greenhills, GHOC determined to see to it that zoning was adopted. It engaged the same planner who had designed Greenhills for the United States to draft an ordinance incorporating his concepts of a model community which were the basis of his original plan and which included the greenbelt. It presented that draft to the proper Village authorities for consideration. It delegated its Vice-President and member of its Board of Directors, Charles Stamm, as its permanent emissary to the plan-

> ning commission and council of the Village in the matter of the adoption of that draft. . . ."
>
> "In any event, for over a year and a half prior to August 1949, the labors of the commission and the council extended throughout day and night, in informal meetings and formal hearings. On the second day of that month and year, without any objection whatsoever, so the written records indicate, a zoning ordinance identical to the original draft as to that part which is in controversy here was duly adopted by the council after favorable recommendation by the planning commission."
>
> "Always in attendance at each meeting considering the zoning ordinance, and always insistent that the ordinance be adopted, was GHOC's representative, Stamm, fortified by the official written position of GHOC's board of directors that the proposal ought to be adopted. From time to time, other officers and directors of GHOC appeared at those meetings to support the passage of the proposed ordinance." (Appendix B, *infra* p. 85.)

The opinion sounds as if it were based on the questions of counsel for respondent, rather than on the answers of the witnesses. In fact that part of the opinion referring to "labors day and night" (just quoted above) could only come from Russell's testimony about the work of petitioner's officers and stockholders, not the Village council or Planning Commission (Rec. p. 54, 1211).

B. The Ohio Supreme Court's opinion includes the following:

> "There is, however, testimony from Stamm alone that in the course of the struggle to secure adoption of the ordinance and, despite the absence of any written objections, he registered the protest that the Greenbelt restriction should not be enacted. However, the fact, that GHOC's legal counsel had advised its board that in his opinion those restrictions were unconstitutional,

was never communicated to any of the village authorities either by Stamm or by anyone else. Without weighing the evidence, Stamm's account of his objections, although vague as to dates, times or specific language, but construed most liberally in favor of GHOC, amounts to this paraphrase: 'We (GHOC) want this zoning ordinance but we object to the Greenbelt provisions. However, if the village will not adopt the ordinance without Greenbelt, then we urge its adoption as drafted and we can adjust our differences at a later time.' "

"At best, this objection was qualified, and, lacking the disclosure that GHOC had convinced itself of the unconstitutionality of the objectionable feature, it was tantamount to inequitable conduct toward the village authorities and the citizens who expected the zoning ordinance, among other things, to preserve an important characteristic of the village." (Appendix B, *infra* p. 87.)

We urgently call the Court's attention to the following excerpt from Mueller's (the respondent Village Solicitor) testimony (R. 1143-1145):

* * * * * *

"Q. Now, at those meetings of council or the Planning Commission, of which you are the legal adviser, did you express any opinion, legal opinion?

"Mr. Beirne: I object. The legal opinion that he expressed would be his own opinion and it doesn't reflect the intention of council. That is determined by what council did.

"The Court: Yes, council passed the ordinance. Justin Hartzog, at that time, was working for the Federal Government, was he not?

"Mr. Gorman: That's right.

"The Court: He had a contract with the Federal Government at this very time, did he not?

"Mr. Gorman: That is correct.

"The Court: And he submitted this ordinance?

"Mr. Gorman: That's right.

"The Court: That ordinance was passed by council. That is the end of it.

"Mr. Gorman: Yes, there is no question about that. But the solicitor is the legal advisor.

"The Court: And this was all the action of the Federal Government in getting this ordinance through. Well, probably it will help us a little bit if he does tell us what the opinion was.

"Mr. Beirne: It is not the agreement, if the Court please. Again, asking Mr. Mueller what his opinion was that was expressed to council, I can't see where that has any bearing on the case whatsoever. You might have different opinions from five different lawyers on a question, but that has nothing to do with the determination of intent.

"The Court: My determination is this, this was the action of the Federal Government and they recognized this.

"Mr. Taft: May it please the Court, I want to submit, in answer to what Mr. Beirne said, as practicing councilman we sometimes ask the solicitor for his opinion, and sometimes in the discussion he expresses an opinion. It is our feeling we were always bound by his opinion that we asked him for.

"The Court: I will permit it. Since he said he did not take any part in drafting this, Justin Hartzog drafted it, and he was at that time under a contract with the Federal Government to do this, I will permit it. All right, he may answer. What was your opinion?

"Q. Did you give an opinion? A. Will you restate that.

"Q. I think I asked you whether, as solicitor at these meetings of the Planning Commission or the council, you expressed any opinion as to zoning ordinance No. 211? A. To this extent, to the Planning Commission. I explained to them that this was quite a large zoning ordinance and I didn't do any research work on the subject, that it included Greenbelt zoning which was something new insofar as I was aware, and that

the restrictive use of the Greenbelt area might come up for question and I had some doubt as to it being upheld.

"Q. That was said to the Planning Commission? A. That's right.

How could failure of GHOC, or its counsel, to transmit its opinion of the unconstitutionality of the Greenbelt provision be "inequitable conduct toward the Village authorities and the citizens," when their own official Village Solicitor told them the same thing at public meetings?

C. The Ohio Supreme Court in its Syllabus 3 says no less than three times, about the zoning ordinance, that it restricts the use of a portion of the land affected thereby to "public park and recreational purposes only." *Merely a reading of the ordinance (Exhibit 2 Record pages 985-6) shows that this is absolutely incorrect.* The uses permitted are public park reservation and play ground, public recreational buildings, allotment gardens, farm, nursery, gardens, public utilities, bus passenger station, signs erected by public authorities for an educational or directional nature for the welfare and convenience of the public, and churches.

At what moment did this zoning provision make the Greenbelt zone a public area? On August 2nd, 1949 against the United States which is not bound by any zoning ordinance? or on January 16, 1950, when the deed was signed? or on January 1, 1950, which the deed by its terms made the effective date.

Newspaper accounts of this decision referred to "park use." This language based on the language of Syllabus 3, leads to a complete misunderstanding of an ordinance that has been in effect for some 15 years and, even when the Court held to its decision, this should have been corrected. The public in the area can well believe that the Ohio Su-

preme Court has now created a new park. This is what counsel for Respondent is telling them. Actually, with the Greenbelt ordinance as adopted and in force, GHOC can operate a tree farm, or a truck farm, and cut down all trees to expand that operation. The land is *privately owned*, not owned by the public, and is not a public park and recreational area. A reading of the Syllabus and the Court's decision can only lead the public to the wrong conclusion and result in the threatened destruction of the last vestige of private ownership left to the petitioner.

D. The Ohio Supreme Court's opinion also includes the following: "On the other hand, the decisions [sic] of the Court of Appeals might well cast premature doubt on the validity of so-called 'development plans' now prevalent in zoning practice." (Appendix B, *infra* p. 81.)

Apparently to the extent that the decision is based upon the opinion, the Court thinks that this is a case of a "development plan" submitted by GHOC. Judge Schneider indicated his idea to this effect in a question during oral argument, and carries it to his opinion. This term certainly needs an explanation. As one example, until the revision of the City of Cincinnati Zoning Ordinance on June 26, 1963, the Cincinnati City Council in proper cases changed a zone with an agreement by the petitioners referred to in the ordinance, to build in accordance with a detailed development plan for construction submitted by the petitioner. Because the City Solicitor had always expressed doubt as to its constitutionality, this procedure was wiped out in the revised ordinance. This evidence is not before the Court, but there is no evidence before the Court and no evidence anywhere that such "development plans" are now "prevalent in zoning practice."

Moreover, this is *not* a case of a "development plan" submitted by GHOC, because:

1. GHOC submitted no plan whatsoever.
2. The zoning ordinance, if that is a "plan," was initiated by the Village itself, and there was no written or verbal agreement by GHOC to build according to any detailed outline or use the property in any exact manner whatever.

Such utter disregard of the undisputed facts (A, B, C), and assertion of facts nowhere in the record (D) is a clear denial of due process of law. This misstatement of the facts was essential to lay any basis for estoppel except perhaps in the case of Syllabus 3 (4) to which we shall refer under Question 5.

This Court has held through Mr. Justice Cardozo in a condemnation case that "to bring about a taking without due process the error [in the State Court] must be gross and obvious coming close to the boundary of arbitrary action." There must be an absolute disregard of the rights of the owner. *Roberts* v. *New York* (1935), 295 U. S. 264. See 16 Amer. Jur. 2d, Const. Law #553. The action of the Ohio Supreme Court here was well within that principle.

While this Court in *Barsky* affirmed the State Court, the majority opinion assumed, and the dissents specified that this Court is called on to review a State Court decision if the State Court by denying relief from arbitrary administrative actions, sanctioned them. *Barsky* v. *Board of Regents* (1954), 347 U. S. 442, 454, 469.

This Court reversed a State Court when on the face of the record it appeared that an indictment and conviction was based on Section #1 of a state statute when the language of the indictment and all the testimony showed it had to do with Section #2 of the Act in question. *Cole* v. *Arkansas* (1948), 333 U. S. 196.

Question 3. *Whether the conduct of the petitioner (which was buying the entire village as the channel or intermedi-*

ary for the purchase of the existing houses by the occupants, with an obligation to Congress to build and sell 500 additional units to veterans and others) in generally supporting the adoption of the zoning ordinance with the greenbelt provision in it, estops it eleven years later from complaining of the unconstitutionality of the ordinance under the doctrine of McKinney v. Carroll, (1838) 2 Peters 66.

Estoppel was not considered by the trial court at all, nor by the Court of Appeals.

The necessary basis for estoppel is not shown.

1. GHOC derived no benefit from the Greenbelt provision.

2. No one was misled (or took any action) in reliance on the Greenbelt, and even if they were, it was not by Petitioner which protested Greenbelt from the beginning. Actually, many structures now built by others on what was formerly Greenbelt may be prejudiced by this decision.

3. As the Court of Appeals pointed out in their unanimous decision, no hardship is involved by the removal of some 140 acres from the actual "Greenbelt," which already comprises over 1900 acres.

Estoppel was discussed in the briefs in the Supreme Court of Ohio but only on the basis of the ancient English case of *Tulk* v. *Moxhay* (2 Phillips 774; 41 Eng. Rep. 143), not on the basis of *McKinney* v. *Carroll* (1838) (2 Peters 66) in the Supreme Court of the United States, and the many cases commenting on it, or said to be following it. This is the basis of Syllabus 3.

McKinney, supra, was a case where a statute was passed giving debtors a statutory extension. The petitioner gave bond, secured the extension, and then contested the statute as unconstitutional and claimed the bond was void. This Court refused to allow the contest on the ground that the

petitioner had availed himself of the benefits of credit from operation of the act, and had thus delayed his creditors.

Most of the cases following this principle are in the United States Courts. Many, like the two Ohio cases cited by Judge Schneider, involve assessments after parties complaining had joined in petitions for the improvement.

We call attention to the language of the opinion in *Mott* v. *Hubbard* (1898), 59 O. S. 199:

> "As parties are not estopped from questioning the constitutionality of a special act by them procured to be passed, as to such matters as yet remain to be done in the future under the Act, it follows that a perpetual injunction should be granted as prayed for."

As to the general principles involved, these are effectively commented on in a note in *34 Harvard Law Review 988.* It holds that affirmative action of some sort by the complaining parties must be the basis for estoppel. After the above correction of the facts, there is nothing except a general endorsement by citizens (GHOC) of a zoning ordinance and building code, a *general endorsement that was no doubt joined in by the vast majority of the residents of the Village.*

Even on the respondent's view of the facts, there was only an absence of objection to the Greenbelt. The law review note, with many citations, indicates that *nonaction is not enough.*

It must be clear, of course, that there was no "procurement" of this ordinance in this case in the sense referred to in *Mott* v. *Hubbard,* supra.

In *Sisters* v. *Winston-Salem* (1956), 243 N. C. 316, 90 S. E. 2d 879, the Bishop bought a large residence in the middle of a single family residence zone in 1949, and applied under the ordinance for a use permit to operate a girls school. Five years later he applied again to enlarge

the use, and was turned down. He then in 1955 sold the property to the Sisters who knew all the circumstances. They applied again for enlargement, were turned down, and then attached in Court the constitutionality of the ordinance. They were held estopped.

Here there is no such history. As soon as petitioner got the property by deed from the United States, Vice President Stamm wrote a letter stating the changes of zone the corporation wished. A number of changes to residential use were allowed to purchasers from petitioner, and only when the additional changes already requested in 1950 were refused after 1957, were these actions brought.

Returning to the elements required to make a case of estoppel, there is no showing of benefits enjoyed by GHOC from the Greenbelt provision. In fact it was consistently a detriment because of taxes, and upkeep required by the Village and the efforts required in "lobbying" in the Village Council and in Court which was necessary to try to get any kind of reasonable use, by a zone change.

Question 4. *Whether the failure of the petitioner to disclose to the village officials the opinion of its counsel that the ordinance was unconstitutional estops it eleven years later from complaining of the unconstitutionality of the ordinance under the doctrine of McKinney v. Carroll, (1838) 2 Peters 66.*

We have already indicated that the Court was wholly wrong in omitting to notice that the village solicitor himself before passage of the ordinance had questioned the constitutionality of Article VI.

Even if he had not, since when is a property owner, affected by a zoning ordinance which in general he supports publicly, required to advise the village that some part of it is unconstitutional when the village solicitor is a competent lawyer advising the village?

Suppose the solicitor believes it constitutional and says so. Does that prevent its being questioned later? This is the most extraordinary claim of estoppel in our experience. It is so extraordinary that we have been able to find no authority on the subject at all.

In any event, since their own lawyer gave the same opinion and warning, it is clearly no basis for estoppel.

Question 5. *Whether the conduct of the petitioner in requesting and receiving from the United States a reduction in the purchase price by reason of the effect of the greenbelt provision in it on the value of the greenbelt acreage, which reduction enured to the benefit, not of petitioner, but of the 312 original purchasers from petitioner, estops it eleven years later from complaining of the unconstitutionality of the ordinance under the doctrine of McKinney v. Carroll, (1838) 2 Peters 66.*

This was a case where the petitioner, with nearly two-thirds of the villagers as membership shareholders, was conducting a general purchase of the village (except for the 121 Dillon lots previously sold by the United States outright); and immediately turning all the residences over to the occupiers in most cases by a purchase contract. The sum of the purchase contracts equalled the $3,500,000 which was paid to the United States, and each purchaser put up the 10% cash to make the $350,000 cash down payment.

Suppose the United States had refused to knock off $100,000 for the greenbelt. Either the deal would have fallen through entirely, with the offer of petitioner standing at $3,500,000, and the United States having reduced its last offer from $4,026,000, only to $3,600,000; or the individual purchasers would have had to dig up, each his part of the extra $100,000, and raised the petitioner's offer to $3,600,000, and the cash to $360,000.

The assumption of the Ohio Supreme Court is that the petitioner was a wealthy capitalist which pocketed the $100,000. The testimony is clear that it had barely enough cash at this stage of the negotiations (August 1949 before the deal was closed) to put up a few thousand dollars for two old pre-existing farm houses that brought the total up to $3,511,000.

So the benefit of the negotiation on the reduced value of the Greenbelt was to the 312 purchasers, not to the petitioner.

The "benefit" referred to in the Syllabus is a reduction in the purchase price of $100,000. We recall to the Court that this only cut the Government's price to $3,937,400 (Rec. 1184). That left a gap above GHOC's best offer of $426,000, and this sum the United States finally wiped off. All these items of negotiation were simply means, understood on both sides, by which the U. S. and GHOC could arrive at an agreed total price. The U. S. kept a value of its own on all the property including Greenbelt, and on May 4, 1950, put a specific value of $12,000 on one piece of Greenbelt (Rec. p. 1160, Exh. 70).

Moreover, the respondents were not in any way affected by this negotiation or even aware of it, and the individuals in the Village who bought over 400 parcels were definitely benefitted by hard and effective bargaining. All reductions in value were passed on to the individual purchasers. This decision penalizes petitioner for reductions it achieved for the benefit of others. All intervenors got their houses not only at wholesale prices but at bargain prices, and have benefitted far more than petitioner itself.

Furthermore the time, effort, and substantial expense to say nothing of the hostility vented on petitioner by the villagers has been a detriment to the corporation costing at least $100,000 worth.

Question 6. *Whether the village respondent, which was not in any way involved in petitioner's negotiations for the purchase of Greenhills from the United States, can claim the benefit of estoppel, when the United States disclaimed any further concern after its mortgage was transferred to Connecticut General Life Insurance Company, which in turn claims no estoppel.*

Here the only actions or representations by petitioner were to give (a) general endorsements of a comprehensive zoning ordinance and building code and (b) a representation to the U. S., *not* to the respondent Village or the intervenors, that the acres zoned as Greenbelt were not usable presently under the zoning ordinance and that their valuation should be taken off the U. S. demand—$100,000. Neither the Village nor its citizens, so far as appears by anything in the record, knew about or relied on this, and it was not to their detriment. *The citizens got their land for less and had to put up less as their down payment.* If the arguments by petitioner had not persuaded the Government to take off $100,000, and many other hundreds of thousands of dollars, the sale might not have gone through at all.

What kind of estoppel is this, and against whom? And for whose benefit?

As to the U. S., the government has made and is making no complaint about any representations, and it was clearly not to their detriment. Within nine months of the negotiations, and five months after the sale, the United States was placing a valuation of $12,000.00 on one piece of Greenbelt of a size proper for an oil station, which GHOC was considering selling, a value far above the $300.00 an acre discussed in the August negotiations.

The United States not only is making no complaint here but in 1952 disclaimed any further concern.

On December 8, 1952 Russell, for the petitioner, wrote as follows (Exh. 30, Rec. 1259):

December 8, 1952

Honorable John Taylor Egan
Public Housing Administration
Washington 25, D. C.

Dear Sir:

Reference is made to a "contract to sell and purchase" executed December 6, 1949 by the Federal Government through your office and the Greenhills Home Owners Corporation.

On October 10, 1951 the Greenhills Home Owners Corporation paid the Federal Government in full through the refinancing of the mortgage with Connecticut General Life Insurance Company.

Our corporation has sold since then to developers and builders undeveloped land. These builders have built to date 10 homes, and have currently under construction some 50 more.

Up to the present time there has been no question raised as to our title. However during the last month we transferred some 50 lots to a developer whose attorney has questioned some of the restrictive clauses in the above mentioned "contract to sell and purchase." He opinions that a veteran can sue under the terms of the contract, specifically—Page 2—Paragraph 7

> "That it shall offer (or cause to be offered) all dwellings hereinafter developed on said property for purposes of sale to tenants of said property as of September 9, 1949 and veterans of World War II (as defined above) for individual home ownership at a purchase price which shall not exceed one hundred-ten percentum (110%) of the cost at which each such dwelling is developed; and that such offers shall remain open for a full and consecutive 30-day period."

This condition if correct, will certainly restrict and possible stop our building program. Builders are not inclined to purchase land and build homes where the sale is in any way restricted.

We therefore are applying to your office for clarification of the intent of the above mentioned document and asking that either the attached document or one prepared by you that will give us the same relief be executed in our behalf. This document will then be filed in the Hamilton County Recorder's Office along with the 54 page document which sets forth the manner of disposition of the property. With this document and a similar one executed by The Connecticut General Life Insurance Company, the company who presently hold the mortgage, it is felt that this question will be resolved once and for all.

The importance and urgency of this matter can not, in the writers opinion be over emphasized. The continued successful operation of this project may very well hinge on having this item cleared up.

Thanking you in advance for consideration in the above matter, I remain

Sincerely yours,
GREENHILLS HOME OWNERS CORPORATION

/s/ J. F. RUSSELL, JR.,
J. F. RUSSELL, JR.,
President

JFR/rh
Enclosure
cc: C. P. TAFT
R. E. DOLLE

On December 29, 1952 Egan for the Public Housing Administration answered as follows (Exh. 29, Rec. 1257):

PUBLIC HOUSING ADMINISTRATION
Washington 25, D. C.

December 29, 1952

Office of the Commissioner

Mr. J. F. Russell, Jr., President
Greenhills Home Owners Corporation
Box 44, Greenhills
Cincinnati 18, Ohio

Dear Mr. Russell:

Returned herewith are the original and one copy of a proposed agreement submitted with your letter of December 8, 1952, regarding certain provisions in the Contract to Sell and Purchase between the United States, acting through this Administration and the Greenhills Home Owners Corporation.

The rights and liabilities of the several parties have been fixed in the conveyancing documents, and therefore, no further modifications will be considered or made, as the Government has fully executed its part of the agreement and considers that it has no further interest in the matter.

Sincerely yours,

/s/ JOHN TAYLOR EGAN,
Commissioner

Enclosures

CONCLUSION

This is clearly a case where a most unusual type of zoning restriction has been used by an agency of the Federal Government in an effort to accomplish a perpetuation by zoning ordinance which the Congress had refused to permit by normal deed restriction with reverter. This effort was taken over and renewed by respondent village some seven years after purchase by petitioner. The restriction was not accompanied by any payment to petitioner, and was clearly a taking of petitioner's property without compensa-

tion, when the respondent refused to make further zone changes.

In this situation the action of the Supreme Court of Ohio in avoiding the Constitutional question by finding petitioner estopped to raise the issue, was based on errors in the interpretation of undisputed facts, which errors were gross, obvious, and arbitrary. This in itself was a denial of due process under the 14th Amendment.

On the undisputed facts shown in the record there is no sufficient ground to hold the petitioner estopped within the general principle laid down by this Court in *McKinney* v. *Carroll*, (1838) 2 Peters 66, often supported since that time in varying states of fact.

We therefore submit that important questions of substance involving the application of the 14th Amendment to municipal zoning ordinances are here presented; as well as a substantial question as to when a petitioner is estopped to raise such a constitutional question. The petition should therefore be granted.

CHARLES P. TAFT,
Attorney for Petitioner,
1003 First National Bank Bldg.,
Cincinnati, Ohio 45202.

On the Petition:
ROBERT E. DOLLE
THOMAS H. MONGAN

APPENDIX A

IN THE

SUPREME COURT OF OHIO

Nos. 39,229, 39,230, 39,231

THE GREENHILLS HOME OWNERS CORPORATION, a corporation,

Plaintiff-Appellee,

v.

THE VILLAGE OF GREENHILLS, OHIO, an Ohio Municipal corporation, et al.,

Defendant-Appellants.

Appeal from the Court of Appeals, First Appellate District, Hamilton County, Ohio

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PLAINTIFF'S EXHIBIT No. 2

ZONING ORDINANCE
VILLAGE OF GREENHILLS, OHIO

Be it ordained by the Village Council of the Village of Greenhills, Ohio:

ARTICLE I. DISTRICTS

Sec. 1. Establishment of Districts.

In the interest of the public health, safety, convenience, comfort, prosperity or general welfare of the community,

the Village of Greenhills is hereby divided into five classes of districts:

a. Residence A District
b. Residence B District
c. Residence C District
d. Business District
e. Greenbelt District

In order to regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land; to regulate and restrict the height, number of stories and size of buildings and other structures and land for business, residence or other purposes.

Sec. 2. Boundaries of Districts.

The boundaries of these districts are shown on a map entitled "Zoning District Greenhills, Ohio," May 5, 1949 which accompanies this ordinance and is hereby declared to be a part hereof.

* * * * *

ARTICLE VI GREENBELT DISTRICT

Sec. 1. Use Regulations.

In a Greenbelt District no land shall be used and no building or structure shall be erected or altered to be used in whole or in part, unless otherwise provided for in this ordinance, except for the following purposes:

a. Public park reservation, and playground.
b. Public recreational buildings.
c. Allotment gardens, farm, nursery, gardens.
d. Public utilities.
e. Bus passenger station.
f. Signs erected by public authority for an educational or directional nature for the welfare and convenience of the public.

Sec. 2. Height Regulations.

In a Greenbelt District no building shall be erected or altered to exceed in height twenty-five (25) feet or one (1) story. Unoccupied towers are excepted.

Sec. 3. Prior Approval of Plans of Permitted Uses.

In a Greenbelt District no land shall be used and no building or structure shall be erected or altered to be used in whole or in part for permitted uses, except after plans for the proposed use, building or structure, and the location thereof, shall have been submitted to the Village Planning Commission for their recommendation.

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A 175,247, A 175,248, A 175,249

THE GREENHILLS HOME OWNERS CORPORATION, a Corporation,

Plaintiff,

v.

THE VILLAGE OF GREENHILLS, a Municipal Corporation, et al.,

Defendants.

OPINION

WEBER, J.

These three law suits were filed by Fienco, formerly known as the Greenhills Home Owners Corporation, against the Village of Greenhills and Nicholas G. Bates, its Service Director and Building Commissioner.

Each of these Actions relates to different parcels of Real Estate, all of which are located in the area designated by Article VI of the Zoning Ordinance of Greenhills as the Greenbelt Area.

Said Article VI (Exhibit 2) reads as follows:

"ARTICLE VI GREENBELT DISTRICT

"Sec. 1. Use Regulations:

"In a Greenbelt District no land shall be used and no building or structure shall be erected or altered to be

used in whole or in part, unless otherwise provided for in this ordinance, except for the following purposes:

"a. Public park reservation, and playground.
b. Public recreational bulidings.
c. Allotment gardens, farm, nursery, gardens.
d. Public utilities.
e. Bus passenger stations.
f. Signs erected by public authority for an educational or directional nature for the welfare and convenience of the public.

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"In a Greenbelt District no building shall be erected or altered to exceed in height twenty-five (25) feet or one (1) story. Unoccupied towers are excepted.

"Sec. 3. Prior Approval of Plans of Permitted Uses.

"In a Greenbelt District no land shall be used and no building or structure shall be erected or altered to be used in whole or in part for permitted uses, except after plans for the proposed use, building or structure, and the location thereof, shall have been submitted to the Village Planning Commission for their recommendation."

Case No. 175,247 is a Mandamus Action to compel the Building Commissioner to issue a building permit to build residences in said Greenhills property.

Case No. 175,248 seeks a Declaratory Judgment as to the validity of said Article VI, and also an Injunction against interference with the development of said property as residence property.

Case No. 175,249 also seeks such a Declaratory Judgment of the property and such an Injunction.

Each case seeks to have the provisions of said Article VI declared unconstitutional and void as a taking of the property therein described without due process and without just compensation.

Appendix B

As stated in the Prospectus issued by the United States Government in contemplation of the sale of Greenhills, the Village of Greenhills was built by the Federal Government in 1936-1938. It was one of three of such Villages built by the Federal Government. Land in excess of requirements of the immediate construction program was acquired when the original tract was assembled in order to provide room for expansion and to create a protective Greenbelt to guard the community against the dangers of intrusion of conflicting land uses.

The Federal Government decided to sell said three Villages, a brief summary of the steps taken, which culminated in the sale of Greenhills, is as follows:

On June 13, 1947, while the United States Government was the owner of the Real Estate known as Greenhills, including the property described in the petitions of the Plaintiff, which are parts of the Greenbelt, it entered into an agreement with Julius R. Hartzog, a Professional Planning Engineer, who had laid out the Village of Greenhills, including the written program containing recommendations as to land uses, a general development plan and a zoning district map, together with a report explaining these purposes. In accordance with the provisions of said agreement, Julius R. Hartzog submitted a plan for the uses and development of said property.

Thereafter, the said Hartzog was employed by the Village of Greenhills to draft a Zoning Ordinance for said Village. Such an ordinance was prepared by him, including the provisions of Article VI relating to the uses of the property in the Greenbelt District as delineated in the zoning map which had been prepared by him for the United States Government.

In June 1948, after the draft of the Zoning Ordinance had been submitted to the Village of Greenhills, the United

States Government, acting by and through the Public Housing Administration, adopted a policy with respect to the sale of all the property in the Village of Greenhills, to restrict the use thereof by means of a Zoning Ordinance to be adopted by the Village. Thereafter the United States Government, by and through the Public Housing Administration, issued a formal prospectus (Exhibit 105) for the guidance of prospective purchasers of the property, setting forth the terms and conditions of the property sale. One of the provisions of said prospectus is:

> "*CONDITIONS OF SALE.*
>
> "*Protective Covenants*
>
> "The deed will contain covenants embodying the following requirements of and limitations upon the successor owners of the properties.
>
> "*Use Restrictions.* Any development program undertaken by the purchaser (or his successor) within the corporate area shall conform to use restrictions embodied in the zoning ordinance to be adopted by the Village of Greenhills."

The plans and recommendations and Zoning District Map prepared by the United States Government, together with said Zoning Ordinance prepared by the Village of Greenhills were known as the Hartzog Plan.

Pursuant to the plan of the United States Government to dispose of said property, the Congress of the United States on May 19, 1949, enacted Public Law 65, which authorized the Commissioner of Public Housing to sell said property by a negotiated sale.

On August 2, 1949, said Zoning Ordinance, including Article VI, was adopted by the Village of Greenhills.

On December 6, 1949, a contract for the sale of said property was entered into between the United States Government and the Plaintiff.

Appendix B

On January 13, 1950, the property was transferred to Plaintiff by a Quit Claim Deed.

In 1953, the Plaintiff reorganized as a profit corporation, the sale to it having been made on the basis that it was a so-called non-profit corporation, that is a limited dividend corporation. Thereafter several zoning changes were made with respect to the property in the Greenbelt and sales of land made accordingly. Later an application was made for further zoning changes to residence uses. These changes were denied by the Village of Greenhills and such denial is the cause for bringing these three law suits.

The Plaintiff claims that the provisions in Article VI with reference to the Greenbelt area, are unreasonable and confiscatory, deprive the Plaintiff as a private owner of all reasonable use of the property, and constitute a taking of private property without due process and without just compensation and therefore are void.

If this were the usual case of zoning property while exclusively in private ownership, the contention of the Plaintiff would have to be sustained, but the facts in this case present a situation entirely different than the usual zoning use, and so unique that Counsel admit they are unable to find a similar case. It is admitted that the Village could not zone the property while owned by the United States Government against its consent. But the Commissioner of Public Housing testified that the United States Government did not object to such zoning; "on the contrary they were the ones who were promoting such restrictions," and this is confirmed by the public documents on record.

The cases were submitted on the testimony, consisting of more than 1700 pages of the record, and 160 Exhibits, and the arguments and briefs. Much of this evidence relates to various defenses of the Defendant and the interveners, and includes evidence of numerous preliminary negotiations be-

tween the grantor, United States Government, and the Plaintiff; the requirement that the purchaser be a non-profit corporation, the later change into a profit corporation, and the subsequent conduct of the Plaintiff in the development of the property. One of the principal contentions of the Plaintiff throughout the trial and in their briefs, is that such preliminary negotiations were merged in the contract and in the deed by the following provisions on page 15 of the contract (Exhibit 4).

> "All negotiations between the parties hereto and of persons who have acted on their behalf are merged in this contract, and this contract contains within its terms and provisions all the terms, provisions, stipulations and conditions agreed to by the parties with reference to the sale and purchase of the project."

However, this provision does not exclude evidence which explains the original meaning and purpose of a condition or restriction mentioned in the contract and deed and to which the conveyance is made subject, although not fully and specifically described in said instruments.

The first defense is a denial of the invalidity of the provisions of said Article VI. Whether such provisions were originally void or have become void is the principal question in the three cases.

The contract and deed refer specifically to certain rights, such as easements and rights to uranium by description and makes exception and reservation of them. The general rule is that the exception of one thing excludes other things. However, such general rule is not applicable in this case so as to exclude restrictions of other rights, although not fully and specifically described, because the contract (Exhibit 4) on page 5 further provides:

> "The government shall convey the project, including realty, personality (sic) and mixed property WHERE IS AND AS IS, without warantee . . . by quit claim instrument, or instruments, subject to all outstanding exceptions, reservations and restrictions and contracts affecting the project at the date hereof. . . ."

In compliance with that provision, the deed (Exhibit 5) on page 10, provides:

"The above described properties are conveyed subject to: (a) All dedications, reservations, restrictions, exceptions and rights of way, easements, taxes, assessments and similar conditions and limitations outstanding and visible or of record."

The clear purpose of this catch-all provision is to make the conveyance subject to all rights outstanding at the time the deed was delivered and which are identifiable by documents of record, even though not fully and specifically described in the deed. The contract was signed on December 6, 1949. The deed was executed on January 13, 1950. At that time the Zoning Ordinance enacted on August 2, 1949, including Article VI and the restrictions therein on the use of the Greenbelt, were in existence and of record. The word "restrictions" does not stand alone; it is modified by the words "outstanding and of record." These words incorporated into the deed, all pertinent documents of record, and require their use as evidence dehors the deed. The use of this evidence does not contradict the deed in any respect, but identifies the restrictions mentioned in the deed and in the manner therein specified.

Such a document is Public Law 65, enacted on May 19, 1949. By necessary implication, said law is incorporated in and is a part of the quit claim deed. Furthermore, the following statement in the deed expressly incorporated said law:

"Pursuant to the powers and authority contained in the provision of Public Law 65."

Section 1, of Public Law 65, reads as follows:

> "The Commissioner is authorized, as a condition of any sale hereunder, to transfer, or to require the transfer or an agreement for the transfer of, streets, roads, public buildings, federally owned utilities, playgrounds, swimming pools, and parks, including *adequate open land surrounding or adjacent to each project*, to the appropriate non-Federal governmental agency, at such times, *to such an extent*, and *upon such terms and conditions as he shall determine* to be in the *public interest*."

Another public document relating to the enactment of Public Law 65 and explanatory of its purpose, particularly with reference to the preservation of the Greenbelt as a protective benefit to the property within the Village of Greenhills, is the report of the Senate Committee (Exhibit 79) which, on page 5, reads as follows:

> "3. Another amendment authorizes the Public Housing Commissioner as a condition to any sale under the bill to transfer (or to provide therefor) with or without reimbursement, to an appropriate non-Federal governmental agency, streets, roads, public buildings, federally owned utilities, playgrounds, swimming pools, and parks, *including adequate open land surrounding or adjacent to the projects.* Such a transfer would be made to the appropriate governmental agency rather than to the purchasing group. *The extent, terms, and conditions of such transfer are to be determined by the Commissioner in the public interest.* The particular portion of the amendment relating to adequate open land is intended to *preserve as far as practicable* the original design of having each of

these projects *protected by a greenbelt* of park and forest land surrounding such a community. *In fact the committee deems it desirable that the Commissioner exercise his authority in such a manner as to retain the essential character of the entire original development in any disposal of these projects.*"

The Plaintiff had full knowledge of these documents at the time the contract was executed and the deed delivered, including the prospectus (Exhibit 105), which stated that "any development program undertaken by the purchaser (and his successors), within the corporate area, shall conform to use restrictions embodied in a Zoning Ordinance to be adopted by the Village of Greenhills."

These documents clearly show the intention of Congress to preserve the Greenbelt area for the benefit of the public. To accomplish that purpose, Congress made it practically mandatory on the Public Housing Commissioner to transfer, or require the transfer of the right to control the use of the Greenbelt to a non-Federal Governmental Agency, leaving to the Commissioner the determination of the extent, terms and conditions of the control best suited for the benefit of the public. Instead of conveying absolute ownership by dedication or otherwise, the Commissioner transferred to the Village of Greenhills a flexible control of the uses of the Greenbelt by means of the restrictions contained in Article VI of the Zoning Ordinance which were made subject to such future modification as the Village might determine were advisable for the future development of such parts of the Greenbelt as might not be suitable for park purposes. The Commissioner apparently considered that the Village was in a better position from time to time to pass upon that question rather than the Federal Government.

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As a public owner, the United States Government, in contemplation of the sale of the property for such development and resale as the contract provided for, had the right by means of use restrictions to transfer such control to another governmental agency, and therefore, as provided in Public Law 65, to make that control a "condition of any sale of the Greenhills property." This was done when the Quit Claim Deed "in pursuance of the powers and authority contained in Public Law 65" made the conveyance subject to "restrictions outstanding and of record." The Village could not place zoning restrictions on the property owned by the Federal Government, without its consent.

See Law of Zoning, METZENBAUM, pages 1285 and 1291.

The Federal Government did not merely consent thereto it procured the enactment of such restrictions for the purpose of transfering control of the uses to another governmental agency. The Federal Government, no doubt, could have revoked such restriction. The following evidence makes it clear that it did not intend to do so but made it a condition of the sale, as required by Public Law 65.

A general reduction of the sale price, not applicable to any particular part of the property, was made. Thereafter, a further reduction of $100,000.00 was made, upon the insistence of the Plaintiff, applicable specifically to the Greenbelt only, on the basis that said Greenbelt had no economical value, because it would be restricted to the uses provided in Article VI. The amount of this reduction was determined by fixing a value of $299.00 per acre, on 331 acres, making a total of $98,969.00 (record page 1710). The Plaintiff got title to Greenbelt for nothing. This was a clear admission by the Plaintiff that it considered the

restrictions valid and that the Federal Government intended that they would be enforced.

Of course, the fact that a private owner of property has paid nothing for it does not bar such private owner from proving that certain restrictions placed on the private property are invalid, but that is not the situation in this case.

The essence of the Plaintiff's case is this: That it is the private owner of the Greenbelt and as such private owner his title thereto includes all the uses ordinarily inherent in private ownership, and that the restrictions unreasonably deprive the Plaintiff of these uses without compensation, even though it paid nothing for the property.

But neither the Plaintiff nor any other private owner has ever had a title to the Greenbelt which includes these uses. The United States Government created the Village of Greenhills, including the Greenbelt, and was the public owner of it. Prior to the execution of the contract and the delivery of the deed, the United States Government, pursuant to, and in compliance with, the authority and purpose of Public Law 65, by means of the restrictions in Article VI of the Zoning Ordinance, transferred the control of the uses in question, for the benefit of the public, to the Village of Greenhills, another governmental agency. Thereafter, a specific amount determined as the value of the Greenbelt, upon the insistence of the Plaintiff, was deducted from the purchase price because the restrictions were intended to, and did, separate said uses from private ownership. Subsequently, the Quit Claim Deed conveyed the property subject to such restrictions, minus said uses as private property. Enforcement of the restrictions will not deprive the Plaintiff, without compensation, of any uses of the Greenbelt to which it is entitled as private property.

Much of the voluminous evidence relates to defenses, such as dedication, estoppel, clean hands and laches. Although they present questions of a possible breech (sic) of the contract with the Federal Government and perhaps others, the primary purpose of these defenses is to bar the Plaintiff from raising the question of the validity of the restrictions. In view of the Court's conclusion that the restrictions are valid, it is unnecessary to determine the merit of any of such defenses for that purpose.

The Court holds that the restrictions contained in Article VI of said Zoning Ordinance are valid but subject to modificatoin at the option of the Village of Greenhills; that the issuance of the Writ of Mandamus and the granting of the Injunctions prayed for should be and are hereby denied.

Please present an entry in each case.

APPEARANCES:

C. ROBERT BEIRNE
ROBERT G. WOELLNER
Attorneys for Greenhills.

ROBERT F. DREIDAME
Attorney for Interveners.

CHARLES P. TAFT
ROBERT N. GORMAN
ROBERT E. DOLLE
Attorneys for Plaintiff.

August 6, 1963.

Appendix B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

Hamilton County, Nos. 9411, 9412, 9413

THE GREENHILLS HOME OWNERS CORPORATION, a corporation,

Plaintiff-Appellant,

v.

THE VILLAGE OF GREENHILLS, OHIO, a municipal corporation, et al.,

Defendant-Appellee.

OPINION

APPEAL ON QUESTIONS OF LAW FROM COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

MESSRS. CHARLES P. TAFT, THOMAS H. MONGAN, ROBERT E. DOLLE, First National Bank Building, Cincinnati, Ohio, *for Plaintiff-Appellant,*

MESSRS. C. R. BEIRNE, ROBERT G. WOELLNER, ROBERT F. DREIDAME, 3801 Carew Tower, Cincinnati, Ohio, *for Defendant-Appellee.*

HILLEBRANT, J.

Three cases consolidated on appeal on the same record and presented to this Court on questions of law.

The fundamental question in these cases is the constitutionality of Article VI of the comprehensive zoning ordi-

nance of the City (formerly Village) of Greenhills adopted by the council of the Village on August 2, 1949. Article VI of the ordinance provides:

"ARTICLE VI. GREENBELT DISTRICT

SECTION 1. *Use Regulations.* In a Greenbelt District no land shall be used and no building or structure shall be erected or altered to be used in whole or in part, unless otherwise provided for in this ordinance, except for the following purposes:

a. Public park reservation, and playground.
b. Public recreational buildings.
c. Allotment gardens, farm, nursery, gardens.
d. Public utilities.
e. Bus passenger station.
f. Signs erected by public authorities for an educational or directional nature for the welfare and convenience of the public.

SECTION II. *Height Regulations.* In a Greenbelt District, no building shall be erected or altered to exceed in height 25 feet or one story. Unoccupied towers are excepted.

SECTION III. *Prior Approval of Plans of Permitted Uses.* In a Greenbelt District, no land shall be used and no building or structure shall be erected or altered to be used in whole or in part for permitted uses, except after plans for the proposed use, building or structure, and the location thereof, shall have been submitted to the Village Planning Commission for their recommendation.

Subsection g. of SECTION I was added by amendment in 1959 to provide as follows:

g. The erection of churches on lots or parcels not less than five acres within minimum lot width of 300 feet, a side yard width of not less than 30 feet and

aggregating a total of not less than 25% of the width of the lot, requiring setback line of not less than 125 feet from front or a side street with the further restriction that no building or group of buildings may be erected to occupy collectively more than 25% of the total lot area with no building or buildings exceeding height, exclusive of spiral or steeple."

The court held the restrictions of Article VI valid and denied the relief prayed for.

The plaintiff is a corporation for profit organized and existing under the laws of the state of Ohio.

The defendant is a municipal corporation organized and existing under the laws of the state of Ohio, with all the powers of local government extended by the constitution and laws of the state.

These cases arise by reason of the fact that the plaintiff seeks the necessary building permits to develop to its highest use the real estate it owns located in the "Greenbelt" area of the city, which is the subject of Article VI of the ordinance, and the city has refused to issue any of such permits, basing its refusal on the efficacy of Article VI of the ordinance.

The parties are in one hundred per cent disagreement on the issues presented to the court. Defendant states in its brief:

"The question presented to the Court is not whether a zoning ordinance may ordinarily be the means by which the use of property may be restricted to park purposes, but specifically whether in the light of all of the circumstances in this case, this ordinance was a valid means of controlling the use of the property for the benefit of the public and whether in the light of the circumstances in this case, this

plaintiff is in any position to question the validity of the ordinance."

Plaintiff states in its reply brief:

"This is a suit whereby the pleadings the Court is called upon to consider the constitutionality of an extremely restrictive zoning being maintained by a municipal corporation. That is the issue and the only issue."

The disagreement on the issues resulted in a six weeks' trial producing 1,574 pages of record and 156 exhibits, and a lengthy finding of fact detailing the history of a governmental experiment in public housing upon lands owned by the government at the time and later disposed of to facilitate veterans' housing.

The Greenhills project was one of three so-called "Greenbelt" towns, subsidized and developed on land owned by the United States, and developed ultimately by the Public Housing Administration. The village of Greenhills was incorporated as an Ohio municipality in 1939, situated on land owned by the government, which also included extensive surrounding territory. The original intention of the government was to insulate the towns with adequate open land providing a park and forest area devoted essentially to public purposes to be maintained during development of the area in such a manner as to preserve the essential character of the entire original development. So long as government ownership continued, it had absolute control of the land use of the entire area.

Congress determined to terminate the "Greenbelt" housing experiment and passed the necessary legislation, Public Law 65, requiring the sale of the "Greenbelt" towns, including the Greenhills area, by negotiated sale. The record shows that in effecting the sale, the government refused to dedicate the "Greenbelt" area by deed to the Village or any

other public authority, but chose the method of fostering a zoning ordinance to be adopted by the Village of Greenhills as adequate to effectuate their original "Greenbelt" intentions. As a result, a comprehensive zoning ordinance was passed containing Article VI quoted above. The Commissioner of Public Housing testified:

> "We considered that the zoning ordinance adopted by the town of Greenhills was adopted before the sale of the property and was adequate protection for that land, that area, and for that reason we saw no necessity of deeding it to the town.
>
> "As a matter of fact, we didn't want to get into any arrangement where the government would have its long arm controlling a piece of property in Greenhills by a reverter clause or such that might be included in that kind of a deed or dedication."

Included in the government issued prospectus of sale was the following:

> *"CONDITIONS OF SALE.*
>
> *"Protective Covenants.*
>
> "The deed will contain covenants embodying the following requirements of and limitations upon the successor owners of the properties:
>
> *"Use Restrictions.*
>
> "Any development program undertaken by the purchaser (or his successor) within the corporate area shall conform to use restrictions embodied in the zoning ordinance to be adopted by the Village of Greenhills."

Included in its offer of purchase (Def. Exhibit 81), was the following:

"D. *Park and Public Areas: Greenbelt.*

"The corporation will endeavor to convey all interior parks and playground areas as presently delineated on the Greenhills plan of development to the Village of Greenhills, and without charge. Similarly, the corporation will convey such portions of the Greenbelt area within the corporate limits as are not suited to development to the Village (or to other appropriate agencies of local government)."

The record shows plaintiff subsequently conveyed to the Village all interior parks and twenty-nine acres of "Greenbelt" to the Hamilton County Park Board.

The government and plaintiff entered into a contract of sale which included the following provisions:

"The Government shall convey the Project, including realty, personalty and mixed properties, 'WHERE IS AND AS IS' without warranty or guaranty as to quantity, quality, or location, by quitclaim instrument or instruments subject to all outstanding exceptions, reservations, restrictions, and contracts affecting the Project on the date hereof, . . ." (Plaintiff's Exhibit 4, page 5).

"Merger of Negotiations. All negotiations and agreements between the parties hereto and all persons who have acted on their behalf are merged into this Contract, and this Contract contains within its terms and provisions all of the terms, provisions, stipulations and conditions agreed to by the parties with reference to the sale and purchase of the Project." (Plaintiff's Exhibit 4, page 15.)

Further, in Contract Exhibit 1 attached to Plaintiff's Exhibit 4 at page 14, paragraph (c), it is stated:

"That it shall not amend or revise its Articles of Incorporation, Code of Regulations, or plan of operation as constituted on the date hereof without the written consent of

the Mortgagee, as long as this instrument, or any indebtedness secured hereby, remains outstanding and in effect."

Pursuant to contract, on January 16, 1950, the government executed and delivered its Quit Claim Deed to plaintiff, transferring the title thereto from government ownership to private ownership.

The Quit Claim Deed, at page 11, states:

"The above described properties are conveyed subject to:

(a) All dedications, reservations, restrictions, exceptions, rights-of-way, easements, taxes, assessments and similar conditions and limitations outstanding and visible or of record."

The habendum clause of the Deed reads:

"TO HAVE AND TO HOLD the foregoing described premises, with all the privileges and appurtenances thereto belonging, to the said Grantee, its successors or assigns, so that neither the Grantor, nor its assigns, nor any other person claiming title through or under it, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred."

On the same day, January 16, 1950, the government, by Deed of Dedication, transferred other property to the Village.

On October 10, 1951, the United States, for a consideration received to its full satisfaction, sold, transferred, assigned and set over to the Connecticut General Life Insurance Company, the purchase money mortgage given by plaintiffs herein. It, therefore, appears the United States, being fully paid, had no objection and could have no objection to the amendment of plaintiff's charter in 1953, some two years later, to its present corporate form.

In reaching its conclusion, the trial court apparently adopted defendant's statement as to the issues raised by the pleadings, and based its conclusion upon the voluminous record detailing the history of the "Greenbelt" housing experiment terminating in negotiated sale by order of Congress through Public Law 65 to private ownership.

The gist of the trial court's conclusion appears in its memorandum opinion filed herein at page 15 et seq. as follows:

"The essence of the Plaintiff's case is this: That it is the private owner of the Greenbelt and as such private owner its title thereto includes all the uses ordinarily inherent in private ownership, and that the restrictions unreasonably deprive the Plaintiff of these uses without compensation, even though it paid nothing for the property.

"But neither the Plaintiff nor any other private owner has ever had a title to the Greenbelt which includes these uses. The United States Government created the Village of Greenhills, including the Greenbelt, and was the public owner of it. Prior to the execution of the contract and the delivery of the deed, the United States Government, pursuant to, and in compliance with, the authority and purpose of Public Law 65, by means of the restrictions in Article VI of the Zoning Ordinance, transferred the control of the uses in question, for the benefit of the public, to the Village of Greenhills, another governmental agency. Thereafter, a specific amount determined as the value of the Greenbelt, upon the insistence of the Plaintiff, was deducted from the purchase price because the restrictions were intended to, and did, separate said uses from private ownership. Subsequently, the Quit Claim Deed conveyed the property subject to such restrictions, minus said uses as private property. Enforcement of the restrictions will not deprive the

Plaintiff, without compensation, of any uses of the Greenbelt to which it is entitled as private property.

"Much of the voluminous evidence relates to defenses, such as dedication, estoppel, clean hands and laches. Although they present questions of a possible breach of the contract with the Federal Government and perhaps others, the primary purpose of these defenses is to bar the Plaintiff from raising the question of the validity of the restrictions. In view of the Court's conclusion that the restrictions are valid, it is unnecessary to determine the merit of any of such defenses for that purpose.

"The Court holds that the restrictions contained in Article VI of said Zoning Ordinance are valid but subject to modification at the option of the Village of Greenhills; . . . ."

With the above conclusion this Court cannot agree.

There is no dispute between the government and plaintiff as to ownership of the property, nor between the City and plaintiff as to ownership, yet the court, by its holding, assumed to decide a question of title, in effect saying that under the circumstances here a zoning ordinance of an Ohio municipality had the effect of limiting plaintiff's ownership and title to something less than full private ownership, contrary to the all important habendum clause in the deed.

A zoning ordinance is not a title instrument and not included in the chain of title to any of the real estate zoned thereby, and in construing the word "restrictions" as it appears in the contract and deed to refer to the zoning ordinance, the court confuses the function of zoning which is concerned solely with use of private property and not its title or ownership. Even if, under the claimed unusual circumstances here, the ordinance could affect the ownership and title, it must have been such an ordinance as was

within the power of an Ohio municipal corporation to adopt, and in the first instance have been a valid constitutional enactment bearing some reasonable relationship to an exercise of the police power. There is no evidence in the record to that effect.

Specifically, we think the statement that the United States, through Public Law 65, by means of Article VI of the zoning ordinance transferred control of the uses in question for public benefit to the Village, is untenable. As we see it, the government did not transfer any control but actually relinquished control as testified to by Housing Administrator, Egan (quoted supra).

The Village passed the ordinance—not the government—and even though requested by, sanctioned, approved and relied on by the seller, the validity of its action was at the time, and we think is now, limited by law to its constitutional powers as an Ohio municipal corporation. We fail to see how government approbation of its acts as an Ohio municipal corporation can either add or detract from its powers.

This Court considers it is bound to decide the issues raised by the pleadings and that the sole issue in these cases is the constitutionality of the highly restrictive zoning ordinance passed by an Ohio municipal corporation.

It is further considered that the rights of the parties must be determined from the record as of now and are not dependent upon the means by which plaintiff acquired its title from the government, whether or not criticized by the defendant.

The government is not a party and possible defenses by it are not available to the defendant, and from an examination of plaintiff's Exhibit No. 1, it appears the City of

Greenhills is completely encircled by the extensive "Greenbelt" of Winton Woods, owned and operated by the Hamilton County Park District, so that the original "Greenbelt" intent is a fait accompli and the essential character of the entire original project, with the cooperation of the plaintiff as shown by the record, has been maintained after disposal by the government in accord with the intent of Congress as shown by Senate Committee hearing and report (Defendant's Exhibit No. 79).

It further appears from plaintiff's Exhibit No. 1, that extensive areas of the original "Greenbelt" have been by the city rezoned for residential use, and substantial footage of the original Greenbelt, adjacent to the actual Winton Woods Greenbelt, is but of token width and proportions.

Coming now to consider the provisions of the ordinance itself, from the evidence and a mere reading thereof, it is clear that the prime object of the zone regulations is to devote the land to public rather than private use. Its main purpose of providing a protective belt of park or forest land is for public benefit rather than a benefit to private use.

In the opinion of this Court, it is clearly an excessive regulation attempted under the police power, is confiscatory in fact and amounts to a taking of private property without just compensation. No citation is necessary to state this violates both the Constitution of the United States and the Constitution of the state of Ohio. The only substantial difference between these restrictions and an outright taking is that the owners are left with the burden of taxation which outright confiscation would avoid.

This Court approves the reasoning and conclusions and cites with approval the authorities relied upon in the very

similar case of *Morris County Land Improvement Company* v. *The Township of Parsippany-Troy Hills*, 193 Atl. Reporter (2d) 232; 40 N. J. 539, wherein the court held:

> "Private property may not be taken for public use without just compensation."
>
> "Township zoning ordinance which greatly restricted use of swampland and had for prime object retention of land substantially in its natural state, essentially for public purposes such as floodwater detention basin and preservation of wetland wildlife sanctuary constitute an unconstitutional taking of land for public purpose without just compensation."
>
> "Zoning ordinance which so restricts use that land cannot practically be utilized for any reasonable purpose or where only permitted uses are those to which property is not adapted or which are economically infeasible is ordinarily confiscatory and beyond police power and statutory authorization."

We deem the principles decisive of the above case decisive here and, without unduly lengthening this opinion, find that Article VI of the Greenhills, Ohio zoning ordinance is unconstitutional and void and by excessive regulation amounts to a taking of private property without just compensation and is an unreasonable exercise of the police power having no reasonable relation to the public health, safety, morals or general welfare.

The judgments herein are accordingly reversed and the causes remanded for further proceedings according to law and this opinion.

HOVER, P. J., and LONG, J., CONCUR.

Appendix B

OHIO BAR

(March 21, 1966 Edition, pp. 207-213)

G. H. O. CORP. v. GREENHILLS

Syllabus.

THE GREENHILLS HOME OWNERS CORP., APPELLEE, v. VILLAGE OF GREENHILLS ET AL., APPELLANTS. (Two cases.)

THE STATE, EX REL. THE GREENHILLS HOME OWNERS CORP., APPELLEE, v. VILLAGE OF GREENHILLS ET AL., APPELLANTS.

(Cite as Greenhills Home Owners Corp. v. Village of Greenhills, 5 Ohio St. 2d 207.)

Zoning—"Comprehensive zoning ordinance" construed—Procuring adoption of municipal zoning ordinance—Estoppel from invoking judicial power to grant relief from restrictions—Constitutionality of legislative enactment—Courts reluctant to determine.

1. A court will not exercise its power to determine the constitutionality of a legislative enactment where other issues are apparent in the record, the determination of which will dispose of the case on its merits.
2. A "comprehensive zoning ordinance" is one which effectively provides for that variety and quantity of land uses deemed necessary to the orderly development of the entire territory of the legislative authority enacting it.
3. Whoever (1) insistently encourages, solicits and procures a municipal corporation to adopt a comprehensive zoning ordinance, notwithstanding that that part of the ordinance is objectionable which restricts the use of a portion of the land affected thereby to public park and recreational purposes only, (2) fails to disclose to such municipal corporation that legal counsel has advised that the proposed ordinance with respect

to such park and recreational lands is unconstitutional, (3) thereafter purchases substantially all the land affected by the ordinance, and (4) requests and receives from the seller a reduction in the purchase price to the extent that the portion of the land restricted to park and recreational uses is transferred substantially without consideration, is estopped from invoking the judicial power to grant relief from such restrictions of the ordinance on the ground that it constitutes a taking of private property without compensation or due process within the meaning of the federal and state Constitutions.

(Nos. 39229, 39230 and 39231—Decided March 16, 1966.)

Opinion, per SCHNEIDER, J.

APPEALS from the Court of Appeals for Hamilton County.

The facts are stated in the opinion.

Mr. Charles P. Taft, Mr. Thomas H. Mongan and *Mr. Robert E. Dolle*, for appellee.

Mr. C. R. Beirne and *Mr. Robert G. Woellner*, city solicitor, for appellants.

Messrs. Lindhorst & Dreidame and *Mr. Robert F. Dreidame*, for intervenor-appellants.

SCHNEIDER, J. In the 1930's, the United States of America erected a model town, in the rural outskirts of Hamilton County, which it called "Greenhills." Surrounding a central commercial area, single-family and multi-family residences were constructed for rental to lower-income family units. Churches, schools and other public meeting houses were provided. The plan included public commons, parkways and playgrounds interspersed with curving streets

and graceful walks. Circumscribing all was a corridor of varying width of grassland and woodland, as a rampart against the intrusion of further urbanization from within as well as from without.

The town was incorporated as an Ohio municipal corporation. After World War II, the government determined to sell the town as an entity to any person or group of persons which could reasonably be found capable of continuing to operate it in accordance with the original plan. Alarmed by this decision, a group of citizens and tenants associated themselves together as a corporate body, the Greenhills Home Owners Corporation (GHOC), for the purpose of qualifying as that purchaser. The purchase was finally accomplished but not without many long months of agonizing negotiations within the corporation and with the Federal Housing Administration as agent for the United States.

The circumferential strip of woodland, known as "Greenbelt," is the focal point of the controversy between GHOC, the plaintiff-appellee, and the village (now a city), a defendant-appellant. A large number of residents of the community whose interests parallel those of the municipal corporation itself joined the proceedings in the trial court as intervening defendants and appear here separately as appellants. The three separate actions seek mandamus, declaratory judgments and injunctions, and were consolidated for trial. The objective of GHOC was the invalidation of the zoning ordinance of Greenhills to the extent that it thwarts GHOC in developing Greenbelt for residential use. The Court of Common Pleas found for the village, holding that the ordinance's restriction of Greenbelt to no other use except public park reservation, playgrounds, public recreational buildings, allotment gardens, farms, nurse-

ries, gardens, public utilities, churches and bus passenger stations, constituted, under all the circumstances, as revealed by an exceedingly complex record, a valid restriction engrafted upon the title of GHOC to Greenbelt. In appeals on questions of law, the Court of Appeals found the zoning ordinance to be unconstitutional so far as it limits the use of Greenbelt as indicated and reversed the judgments to the Court of Common Pleas.

Our view of the matter will not require a lengthy excursion among the myriad facets of a basically simple case, vastly over-complicated, to paraphrase the trial judge.

Although its conception and birth were the subject of meticulous study and planning by government experts, Greenhills, for the decade and one-half during which it remained under the ownership of the government, was, unlike the usual community, unneedful of, and in fact without, a zoning ordinance to protect its existing arrangements and to control its future development according to its original plan. As overlord, the United States regulated the use of every inch of land and of every blade of grass. However, prior to its purchase of Greenhills, GHOC determined to see to it that zoning was adopted.

It engaged the same planner who had designed Greenhills for the United States to draft an ordinance incorporating his concepts of a model community which were the basis of his original plan and which included the Greenbelt. It presented that draft to the proper village authorities for consideration. It delegated its vice-president and a member of its board of directors, Charles Stamm, as its permanent emissary to the planning commission and council of the village in the matter of the adoption of that draft, notwithstanding that two other board members were also

members of the planning commission and two other board members were village councilmen.

In any event, for over a year and a half prior to August 1949, the labors of the commission and the council extended throughout day and night, in informal meetings and formal hearings. On the second day of that month and year, without any objection whatsoever, so the written records indicate, a zoning ordinance identical to the original draft as to that part which is in controversy here was duly adopted by the council after favorable recommendation by the planning commission.

In addition to the Greenbelt district, the ordinance divided the entire village into four other districts, three involving residential uses and one for commercial purposes. It regulates the density of uses within the districts, the height of structures, lot usage, and so on. In short, it is a comprehensive zoning ordinance in that it provides for that variety of land uses deemed necesary to the preservation of that portion of the village plan already executed and to the orderly completion of that plan.

Always in attendance at each meeting considering the zoning ordinance, and always insistent that the ordinance be adopted, was GHOC's representative, Stamm, fortified by the official written position of GHOC's board of directors that the proposal ought to be adopted. From time to time, other officers and directors of GHOC appeared at those meetings to support the passage of the proposed ordinance.

After its adoption, the negotiations for the purchase of the town, which had been lopping along at a flaccid pace, swiftly reached the end of their course. But not before the United States was prevailed upon by GHOC to reduce the purchase price by $98,969, representing the appraised

value of the 331 acres of Greenbelt at $299 an acre, because Greenbelt had been zoned as indicated and hence unavailable for the use now desired by GHOC.

The village and the intervenors contend that GHOC's promotion of the ordinance containing the Greenbelt restrictions was pursuant to the insistence of the United States that zoning appropriate to its original conception as a "Greenbelt" town be adopted prior to any sale. Thus, it is claimed that GHOC was, if not the agent of the United States, the principal actor in an endeavor which was a *sine qua non* to GHOC's qualification as the purchaser. Alternatively, appellants claim that the promotion of the ordinance was designed to strike $100,000 from the purchase price. GHOC, of course, emphatically denies both contentions and pleads that its participation in securing the ordinance was simply for the purpose of advancing the general welfare of the community. In our view, the truth or falsity of these claims to which a major portion of the six-weeks trial was devoted, is immaterial. Equally immaterial is whether the United States even knew of GHOC's participation in seeking the zoning ordinance, although the trial court found that it did.

The critical facts were never in dispute. GHOC did actively promote, as hereinbefore indicated, a comprehensive zoning ordinance over the course of a year and a half. During all this time GHOC was the potential purchaser of substantially every square foot of land subject to that ordinance. GHOC did, in fact, purchase that land. And GHOC thereby became the beneficiary of every good (neither the greatest nor the least of which was a reduction in the purchase price) and the endurer of every evil, if any, flowing from that ordinance.

There is, however, testimony from Stamm alone that in the course of the struggle to secure adoption of the ordinance and, despite the absence of any written objections, he registered the protest that the Greenbelt restriction should not be enacted. However, the fact that GHOC's legal counsel had advised its board that in his opinion those restrictions were unconstitutional, was never communicated to any of the village authorities either by Stamm or by anyone else. Without weighing the evidence, Stamm's account of his objections, although vague as to dates, times or specific language, but construed most liberally in favor of GHOC, amounts to this paraphrase: "We (GHOC) want this zoning ordinance but we object to the Greenbelt provisions. However, if the village will not adopt the ordinance without Greenbelt, then we urge its adoption as drafted and we can adjust our differences at a later time."

At best, this objection was qualified, and, lacking the disclosure that GHOC had convinced itself of the unconstitutionality of the objectionable feature, it was tantamount to inequitable conduct toward the village authorities and the citizens who expected the zoning ordinance, among other things, to preserve an important characteristic of the village.

The first rule controlling these cases is that a court will not exercise its power to determine the constitutionality of a legislative enactment unless it is absolutely necessary to do so. *State, ex rel. Lieux*, v. *Village of Westlake*, 154 Ohio St. 412. And, such necessity is absent where other issues are apparent in the record which will dispose of the case on its merits. *Crowell, Commr.*, v. *Benson*, 285 U. S. 22.

These precepts were ignored by the Court of Appeals in declaring the ordinance unconstitutional solely on the basis

of *Morris County Land Improvement Co.* v. *Township of Parsippany-Troy Hills*, 40 N. J. 539, 193 A. 2d 232. The restriction declared invalid in that case was an amendment to an existing comprehensive zoning plan, which further limited a single area to water-life and flood control purposes without any participation or consent to its enactment by the owner of the land affected. Furthermore, a comparison of that situation with the limitations of Greenbelt in this case, is an unrealistic as it is premature. Similar limitation is inherent in every ordinance or zoning regulation which requires "open space" on all building lots. Such required "open space" is perpetually "used' 'to preserve maximum density of the active uses of land to prevent overcrowding and to minimize health and safety hazards. In these cases, the "open space" is located in one area. Therefore, it is no more correct to hold that Greenbelt is not "in use" than to hold that "open space," in the form of "setbacks" and minimum yard requirements, is not "in use."

The ordinance here may well violate the constitutional rights of GHOC quite apart from the reasoning of the Court of Appeals. Conversely, it may well be constitutional in spite of the rule of *Morris County Land Improvement Co.*

But the enduring value of the rule restraining precipitous constitutional determinations is well illustrated by these cases. The decision of the Common Pleas Court would tend to over emphasize zoning as an element of the law of reail property. On the other hand, the decisions of the Court of Appeals might well cast premature doubt on the validity of so-called "development plans" now prevalent in zoning practice.

Therefore, the second rule of law which we adopt as applicable here and from whose strictures GHOC has

clearly failed to remove itself is tautly drawn in *Board of Levy Commissioners* v. *Johnson*, 178 Ky. 287, 199 S. W. 8, to the effect that where there is clear evidence that a party seeking to assail a regulation as unconstitutional "aided in procuring the legislation and derived benefit therefrom and that to set it aside would work a hardship or injustice on others who were misled to their prejudice into believing that the legislation was valid," estoppel will deny any right to pursue the attack on validity.

The rule has been recognized in less stringent form by this court in *Mott* v. *Hubbard, Treas.*, 59 Ohio St. 199, and *City of Mount Vernon* v. *State, ex rel. Berry*, 71 Ohio St. 428. It has been applied in many other jurisdictions. See, for example, *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407; *St. Louis Malleable Casting Co.* v. *George C. Prendergast Constr. Co.*, 260 U. S. 469; *Daniels* v. *Tearney*, 102 U. S. 415; *Vickery* v. *Board of Commrs. of Hendricks County*, 134 Ind. 554, 32 N. E. 880; *Foley* v. *State, ex rel. King, Atty. Genl.*, 157 Okla. 202, 11 P. 2d 928; *Hoertz* v. *Jefferson Southern Pond Draining Co.*, 119 Ky. 824, 84 S. W. 1141; *DeNoma* v. *Murphy*, 28 S. D. 372, 133 N. W. 703; *Owens* v. *Corporation Comm. of Okla.*, 41 F. 2d 799; and *Convent of Sisters of St. Joseph of Chestnut Hill* v. *City of Winston-Salem*, 243 N. C. 316, 90 S. E. 2d 879. See, also, 16 American Jurisprudence 2d 328 *et seq.*, Section 131 *et seq.*; 48 Harv. L. Rev. 988; 34 Col. L. Rev. 1498; and 34 N. C. L. Rev. 514.

As already shown, procuration and benefit are manifest in this record Only injustice to the appellants can flow from a judgment in favor of the appellee who is, therefore, estopped from having it. Accordingly, the judgments of the

Court of Appeals are reversed and final judgments are granted in favor of the appellants.

Judgments reversed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT and BROWN, JJ., concur.